FINAL REPORT
(Part II)

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Title : Bilingualism & Biculturalism
in the Supreme Court of
Canada.
Div: II contract: no 5

Chapter V

Qualitative Analysis of Leading Decisions

1. Purpose and Assumptions of Inquiry

Throughout our quantitative analysis of the Supreme Court's decisions we warned against any attempt to derive firm conclusions about the determinants of the Court's decision-making from a purely statistical record of its disposition of provincial appeals or a bloc-analysis of its judges' voting-patterns. As an approach to providing explanations of why a court decided issues in a particular way quantitative analysis can at most generate new hypotheses or provide evidence (positive or negative) which might strengthen one's reasons for accepting some explanatory theory of a court's decision-making. But the kind of theories which quantitative studies tend to generate or support must be backed up by a careful examination of leading cases in the area of the court's decision-making which the theories purport to explain.

Quantitative analyses by seeking to identify consistent trends in the outcome of a court's adjudication assume that a certain factor or factors (usually extra-legal in nature) may be responsible for the court's judgments in a particular kind of dispute. The main purpose of our particular quantitative study has been to ascertain whether a

statistical view of the Court's disposition of appeals or the voting of its judges in any group of cases is consistent with an explanation of its decision-making which considers the ethnic background of the judges - i.e. whether the judge is English or French Canadian - as a critical causal factor. What we have insisted upon is that even where we did find a positive correlation between the ethnic identity of judges and the judgments arrived at (as indeed we did in at least a hard core of cases touching upon civil liberties questions and what we defined as potential "bicultural issues") before accepting the bicultural explanations of judicial behavior indicated by this correlation we must see whether on the basis of a close reading of the key decisions in these areas, the explicit and implicit grounds of the judges' opinions corroborate a bicultural theory.

We must admit that the very attempt to find cultural values at work in the reasoning of judges implies a particular view of the judicial process. At least negatively our approach implicitly rejects a thorough-going positivist conception of the judge's role: by looking for some trace of the culturally conditioned attitudes which the judge might bring into his adjudicative work we must assume that adjudication may often involve more than the objective application of pre-determined rules to particular cases. In eschewing a rigidly positivist interpretation of the judicial process we commit ourselves to what has traditionally been called the realist or sociological school of thought at least to the

extent that we are willing to entertain the hypothesis that the personal attitudes of judges can account for their arriving at different determinations of the same dispute.[1] By "the personal attitudes" of judges we mean no less than what Mr. Justice Cardozo of the United States Supreme Court attributed to all his fellow practitioners of the judicial art when he wrote

> . . . there is in each of us a stream of tendency whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions. . . . In this mental background every problem finds its setting. We may try to see things objectively as we please. None the less, we can never see them with any eyes except our own. . .[2]

Our inquiry postulates that in certain kinds of controversy adjudicated by the Supreme Court one of the decisive ingredients of what Cardozo calls the "mental background" of the judges may be social values or outlooks which can be associated with one of Canada's two major cultural groups.

And yet we should note that our commitment to the realist-sociological viewpoint need not be simple and unqualified. To seek to identify the points in the adjudicative process at which the judge has acted as the transmitter of

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[1] While American literature on the rivalry between the positivist and realist theories of law is voluminous, the Canadian contribution to this subject is relatively slight. But, for two distinctive contributions see W. Friedmann, "Judges, Politics and the Law," 29 Canadian Bar Review (1951) 813 and Edward McWhinney "Legal Theory and Philosophy of Law in Canada" in his Canadian Jurisprudence, above page 210 , footnote 1 at pp. 10-17.

[2] Quoted in Walter F. Murphy and C. Herman Pritchett, (eds.), Courts Judges and Politics, (Random House 1961) p. 27.

social values not exclusively derived from objective legal rules need not imply that judges make decisions as autonomous legislators in an arena of unprincipled discretion.[1] As Justice Cardozo remarked in a later passage from the same work from which we have already quoted, a judge

> is not to innovate at pleasure. He is not a Knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life."[2]

To ignore the extent to which the judge's understanding of his own function as that of authoritatively settling disputes in a like manner to similar past disputes fetters the free exercise of his own private views would be impertinent, and what is worse, erroneous. Indeed for the contemporary student of the judicial process the poles of rigid positivism and unmitigated sociological realism are surely unreasonable alternatives. On the premise that rule and discretion are interwoven components of the adjudicative process our effort here is directed at finding at what point a difference in the choices judges make among competing legal principles or precedents or

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[1] For an articulate warning to neo-behavioralists who "(H)aving rediscovered the ancient truth that there is and must be pliability in the law," might, "discount the equally ancient truth that there is and must be law in the law", see Wallace Mendelson, "The Neo-Behavioral Approach to the Judicial Process: A Critique" 57 American Political Science Review, (1963) 593, at p. 603.

2. Above, page 405, footnote 2

between different applications of the same legal rules seems to have been influenced by a divergence in their personal values which is at least in part produced by the difference in their ethnic backgrounds.

There can be no denying that it is far more difficult to apply this kind of investigation to the decisions of the Canadian Supreme Court than to those, for instance, of the United States Supreme Court. Traditionally the jurists who have manned the Supreme Court of Canada have conceived of their function in terms of the positivist image.[1] And although the intellectual force of the American realist school of jurisprudence coupled with the practical implication of the Court's new responsibilities as the final arbiter of Canadian legal disputes including those which raise new and enormously important questions concerning the legality of public policy may have forced upon the Supreme Court judges a larger awareness of the Court's unavoidable rôle "as a community policy-maker",[2] this has rarely resulted in a noticeably more candid acknowledgement of personal values or philosophies by Supreme Court judges in the reasoning with which they have supported their opinions.[3]

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[1] For further discussion of the Court's conservative adjudicative posture see above pp. 143-151.

[2] This is Professor McWhinney's phrase. See his Canadian Jurisprudence, p. 117.

[3] Although there are some notable exceptions to this as in Justice Taschereau's opinion in Saumur v. Quebec and A.-G. Que. [1953] 2 S.C.R. 299 and Justice's Rand dictum on the rights of the Canadian citizen in Winner v. S.M.T. (Eastern) Ltd. and A.-G. N.B. [1951] S.C.R. 857.

Consequently our analysis of some of those judgments in which we suspect that the judges' attitudes to the policy issues involved in a case have had something to do with the outcome of their deliberations will necessarily take the form of trying to unmask value-judgments which may be expressed in terms of dispassionate legal reasoning. To the unrelenting positivist such an approach will be regarded as misguided. . But it is our contention that if this kind of analysis is carried out with intellectual honesty and sensitivity it can strengthen that knowledge of judicial subjectivity which as a kind of catharsis can effectively promote judicial rationality.

In selecting the cases for study in this section of our work we have, in the main, followed the categories of bicultural issues used in the quantitative questionnaire.[1] In addition we have examined some of the leading cases in which the issue raised a substantive or procedural question relating to bilingualism. But we have not singled out for separate treatment leading examples of cases in which the division of judicial opinions would appear to be based

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[1]The preliminary work in this section was carried out by Mr. Donald Brown (LLB Osgoode Hall, LLM Harvard, now with the Faculty of Law, University of Singapore). While Mr. Brown's original selection of cases was carried out independently of the quantitative study reported in chapter IV, later drafts of this material took into account the cases used in the quantitative study, especially in relation to Question 11 on Bicultural issues.

essentially on a difference between common law and civil law precepts or methods of adjudication. Although we may find that where there is a bicultural division of opinion on a question, for instance, pertaining to family relations or civil liberties, the division can be traced at least in part to the difference between a common law and a civil law approach to the problem. But a systematic examination of legal dualism in the Supreme Court's decisions would go far beyond the scope of this study. Such an examination would have to be far more sensitive to manifestations of competing legal values and techniques than our study, which is primarily a political science study, is capable of being. Rather than seeking for evidence of a bicultural clash of opinion in the choice of different legal precedents or techniques of interpretation, we have sought for it primarily in terms of the judges' conceptions of the proper social relationships which the law should uphold.

But in seeking for evidence of a <u>bicultural</u> clash of values we must bear in mind the warning stated earlier in Chapter II;[1] we cannot assume that where French-speaking and English-speaking judges have differed on the basis of some conflict of value-judgments that this necessarily represents a conflict of French-Canadian versus English-Canadian values. We must look carefully at the contrasting social attitudes

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[1] See above pages 142-143; also page 300.

and at least speculate as to how reasonable it is to explain the difference of opinion in terms of the difference in the judges' ethnic background. The same warning is equally applicable to a difference of opinion between Quebec and non-Quebec judges which may be interpreted as resulting from the difference between attitudes based on the English common law and those based on Quebec civil law. Such an interpretation may too readily assume two propositions: 1) that there is one typically common law or one typically civilian approach to a legal issue and 2) that these typical approaches are in fact embodied in the opinions of the Supreme Court judges.

In our study of the Supreme Court's important recent decisions affecting bicultural and bilingual issues we are interested not only in identifying bicultural divisions of opinion on the Court's bench but also in the manner in which the Court has negotiated or adjudicated these questions which may potentially affect French-English relations in Canada. Indeed in several categories of cases we may find that it is the latter interest which is paramount. Where there is no significant division of opinion among the judges the main point of our inquiry will be to report the Court's contribution to the settlement of controversies which might have generated French-English controversies.

2: Cases Raising Questions of Bilingualism

We have dealt at length with bilingualism in the

Court's proceedings in Section 2 of Chapter III. Here we wish only to comment on those few cases in which the question of bilingualism as a substantive issue was before the Court. Since 1949 there have been very few such cases and certainly none that divided the Court on ethnic lines.

The only context in which the question of bilingualism as a substantive right was raised was in connection with an accused person's right to have a jury composed of persons whose primary language is that of the accused. Piperno v. The Queen [1953] 2 S.C.R. 292, brought this question before the Supreme Court for the first time in the form of an accused person's demand to be tried in Quebec by a completely English-speaking jury. Section 923(2) of the Criminal Code gave the accused a right to demand a jury entirely composed of English-speaking persons or entirely composed of French-speaking persons. But in this case the Supreme Court with Justice Fauteux writing the opinion of the Court[1] supported the majority of the Quebec Court of Queen's Bench and ruled that the accused's right to an English or French-speaking jury is not an absolute right. Following the jurisprudence worked out in a number of Quebec decisions, Justice Fauteux

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[1] Justices Kerwin, Taschereau and Estey concurred with Justice Fauteux. Justice Cartwright took the view that the Court had no jurisdiction in this case, and consequently expressed no opinion on the question.

held that the condition attached by section 924 of the Criminal Code to the accused's right in Manitoba to trial by French or English-speaking jurors, namely that the accused could only ask to be judged by jurors familiar with the language spoken by the accused, also applied to the accused in Quebec. In this particular case, the accused, although of Italian extraction, was fluent in both French and English so that the right to a jury skilled exclusively in French or English had no application to him for, to quote Justice Fauteux, "qu'un seul, que plusieurs ou que même les douze jurés soient versés dans la langue française ou dans la langue anglaise, ou dans les deux, dans tous les cas, le corps du jury est versé dans une langue familière a l'accusé." (at p. 295).

In the Matter of a Reference Re Regina v. Coffin [1956] S.C.R. 191 The Court's majority once again displayed a practical concern with setting some reasonable limitation on the accused's right to be tried by twelve jurymen of his own language. The limitation invoked here was derived from the third subsection of Section 923 of the Criminal Code which states that the accused's demand for a trial by 12 English-speaking or 12 French-speaking jurors would be granted by the judge unless in the judge's opinion "the ends of justice" would be better served by having a mixed jury. The majority[1] agreed that the trial judge had

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[1]Justices Taschereau and Kellock both wrote opinions for the majority and both expressed agreement with the trial judge on this point. Chief Justice Kerwin concurred with Justice Taschereau; Justices Rand and Fauteux concurred with Justice Kellock.

properly exercised the discretion bestowed on him by section 923(3) when he denied Coffin's request for a completely English-speaking jury on the grounds that to grant such a request would have meant eliminating 85 to 88% of the local population as eligible jurors.

Justice Cartwright, however, supported by Justice Locke, disagreed with this reasoning. In Justice Cartwright's view the trial judge had erred in basing the exercise of his discretionary power to deny the accused's request for a jury composed entirely of English-speaking persons on the grounds that by granting the request he would be disqualifying the bulk of the local population for eligibility for jury duty. Justice Cartwright argued that this consideration was not relevant to the question of whether the ends of justice would be best served by empanelling a mixed jury rather than one composed entirely of jurors speaking the language of the accused. What we should note here is that the disagreement between the Court's majority and Justices Cartwright and Locke stemmed primarily from their divergent assessments of the prime values to be upheld in the administration of the criminal law. Justice Cartwright, true to his rights- of-the-individual philosophy, evidence for which we have already set out in our quantitative study, denied that the practical difficulty involved in raising a completely English-speaking jury in a predominantly French-speaking region had anything to do with serving the "ends of justice"

and he insisted that this consideration could not justify depriving the accused of his right to be tried by jurymen who spoke his own language. But the majority clearly gave a higher priority to avoiding an extreme inconvenience in making the arrangements for the trial than to the defendant's interest in being tried by jurors familiar with his own language. Justice Taschereau explicitly acknowledged this evaluation of the interests involved in this issue when he prefaced his agreement with the trial judge's reasoning with the following statement:

> Malgré que dans un procès criminel, l'intérêt de l'accusé soit primordial, l'intérêt de la société ne doit pas être méconnu,...(at p. 207).

We might further note that this difference in the value-judgments of the two sides of the Court can not be accounted for in terms of the judges' ethnic backgrounds. Not only is there the fact that Justices Taschereau and Fauteux were joined on the majority side by Chief Justice Kerwin and Justices Kellock and Rand but also it is clear that Justice Cartwright's defence of Coffin's right to an English-speaking jury was not based on a particular concern to defend the rights of English-speaking persons in French-speaking regions of Quebec. The difference of opinion which we have identified turns basically on divergent evaluations of the interests involved in the administration of the criminal law. It would seem most likely that this difference of opinion crosses ethnic lines both on and off the bench.

However, it is interesting to observe the outcome of this difference when applied to the question of the accused's right to 12 jurymen of his own language: the Supreme Court majority supported by both of the Court's French-speaking members and in line with the main tenor of judicial opinion within the Quebec judiciary were willing to curtail the defendant's right to determine the language of his jury if it was necessary to safeguard society's interest in the expeditious conduct of a criminal trial.

The Coffin case raised a second question involving the use of French and English in a criminal trial. Coffin's trial took place before a mixed jury so that the trial judge saw fit to charge the jury in both languages, and furthermore one counsel for the prosecution as well as one for the defense addressed the jury in one language while each of his associates addressed the jury in the other language. One of the grounds of Coffin's request for a new trial was the contention that the differences between the addresses in the two languages meant in effect that the defendant was tried by two groups of jurymen composed of six men each. The Supreme Court with no dissenting opinion[1] rejected this argument. Both Justices Taschereau and Kellock reasoned that with a mixed jury it was perfectly logical to have the judge and counsel for both sides address the jury in French and English. Also earlier Supreme Court judgments were found to provide some authority for the proposition that with a mixed jury at least

[1]Justices Cartwright and Locke offered no opinion on this point.

the evidence and the judge's address to the jury should be translated into both languages.[1] However, Justice Kellock concluded his judgment with the following statement:

> In my opinion, neither the differences to which we were referred as between the address on behalf of the prosecution in the one language and the other, nor the charges, were of a nature to call for the interference of this Court in the grant of a new trial. (at p. 215).

The inference to be drawn from these words would seem to be that if in the Court's view there was a significant difference between the judge's charge or counsel's addresses in one language and their counterparts in the other language, it might consider this grounds for ordering a new trial.

Besides this treatment of bilingualism as a substantive issue in criminal appeals bilingualism was employed by the Court as a positive instrument of interpretation. On a number of occasions judges consulted the French or English version of a document in order to resolve ambiguities or doubts in interpreting it. This intrepretative technique was, of course, most apt for interpreting federal and Quebec statutes which are printed in both languages. Here the Court's policy of insisting that both the French and English versions of a statute must be read together has assisted judges in firmly elucidating the meaning of statutory provisions. In Industrial Acceptance Corp. v. Couture [1954] S.C.R. 34, for

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[1] The authorities were Justice Brodeur in Veuillette v. Le Roi (1919) 58 S.C.R. 414, at p. 424 and Justice Mignault in the same case at p. 430.

example, Justice Estey consulted the French version of a Quebec statute in order to establish that the word "may" in the English version was to be taken as an imperative. And again in More v. The Queen [1963] S.C.R. 522 Justice Fauteux in working out the proper meaning to attach to the word "deliberate" in the section 202A(2)(a) of the Criminal Code appertaining to capital murder compared the French and English phases and their respective dictionary definitions. Nor has the Court confined the application of this technique to Quebec and federal statutes. In Bellavance v. Orange Crush Limited [1955] S.C.R. 706 Justice Rand applied this French-English comparison technique of interpretation when, in order to clarify the meaning of a commercial contract, he resolved an ambiguity in the English version by consulting the French version.

Many other examples of the Supreme Court's use of bilingualism in interpreting statutes and other documents could be cited.[1] Suffice it to say that this would appear to be an area in which the bilingual and bicultural nature of the Court and its work instead of raising problems increases the Court's capacity for effectively performing its duties.

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[1] Our quantitative study in questions 14 and 15 turned up 12 cases in which English was used to explain a French text and 7 cases in which French was used to explain an English text.

3. Family Relations Cases

Cases which raise significant questions involving family relationships might be regarded as a potential source of ethnic or perhaps ethnic-religious divisions on the Supreme Court bench. Certainly a number of cases which came before the Court in the post-1949 period posed such questions and a fair proportion of these produced a division of opinion on the Supreme Court bench. But very few of these divisions would appear to be susceptible to a bicultural explanation. As we have already seen in our quantitative analysis of judicial voting in bicultural issue cases, most of the split decisions which have found the French Canadian judges forming the nucleus of a dissenting bloc have been in the field of civil liberties. Cases involving bicultural issues other than civil liberties accounted for relatively few of these divisions.[1] Even in the latter part of the post-1949 period when six cases involving some aspect of family relations lead to a split decision not one of these cases produced a dissent by either of the Court's French Canadian judges.[2]

Indeed it is worth noting the relatively high degree

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[1] See especially the difference between Tables 7a and 7b and between Tables 7g and 7h.

[2] See above, page 349.

of ethnic agreement on an issue such as divorce and matrimonial offences which might be expected to generate a clash of ethnic values. But while Quebec judges participated in cases dealing with matrimonial offences they have, on the whole, silently concurred with their common law, English-speaking colleagues. Smith v. Smith [1952] 2 S.C.R. 312 is representative. The issue in this case was whether the burden of proof of adultery was simply the "balance of probabilities" or the more onerous one of "beyond a reasonable doubt". A unanimous Court including Chief Justice Rinfret and Justices Fauteux and Taschereau opted for the less demanding test and concluded that the burden of proof was no different than in any other civil case, namely, on the "balance of probabilities".

But a few cases raising questions of family relations have given some evidence of a bicultural division of the Court. One such area is that pertaining to property in a marriage context. But here the difference of opinion between French Canadian civilian judges and English-speaking common law judges in so far as it has anything to do with ethnic background would appear to turn primarily on the question of whether Quebec and French authorities or English authorities should be followed in deciding how to adopt a federal statute to local conditions in Quebec. For example in a case reported late in 1949, Minister of National Revenue v. The Royal Trust Co. [1949] S.C.R. 727, the Court had to decide how to apply the terms of the Dominion Succession Duty Act to a debt owed to

a widow under a marriage contract executed in Quebec. Under the contract in question the husband had obligated himself during the existence of his marriage to pay his wife $20,000 in consideration of her renunciation of community and dower. This sum remained unpaid at the time of the husband's death in 1943. His executors claimed to deduct this amount from the value of his estate for the purpose of the federal Succession Duty. The Succession Duty Act in Section 8(2)(a) exempted only those debts "created bona fide for full consideration in money or money's worth." One of the central questions was whether or not $20,000 owing to the wife under the marriage contract constituted such a debt. Justice Taschereau, with Chief Justice Rinfret concurring, dealt with this question by consulting Quebec and French authorities on agreements made in marriage contracts and concluded that, since the agreement entered into was "bilateral and onerous" and lacked the element of gratuitousness", the money involved was not a gift but a real debt and should be deducted from the value of the estate. In contrast to this, Justice Kerwin followed English decisions interpreting the British Succession Duty Act which held that money payable under a marriage contract upon death is subject to succession duty since the contract was not made for valuable consideration in money or money's worth. It is interesting to note that on this occasion the decisive votes were cast by Justices Rand and Estey who agreed with the two Quebec judges on the

disposition of the appeal. However, Justice Rand who wrote the opinion for this pair of justices reached his conclusion by a different route from that followed by the two civilian judges. Still he warned against the use of English authorities when dealing with the application of a federal statute and concluded that the conflicting interpretations to which this phase of the federal statute was subject strengthened the executors' case, for a taxing statute must make reasonably clear the intention to impose a tax. (p. 744)

In one other case involving the application of a federal taxing statute to a marital situation in Quebec, there was some expression of civilian concern about the possible encroachment of alien authorities into the interpretation of Quebec's civil law. This was in Sura v. Minister of National Revenue [1962] S.C.R. 65 where the question was whether income made up of a husband's salary and rentals but held in community by husband and wife could, for purposes of the federal income tax, be considered as belonging one-half to the husband and one-half to the wife. Justice Taschereau writing for a unanimous court rejected this use of the community of property to soften the burden of the federal income tax. The interesting point in his judgment is his repudiation of authorities from the eight states of the United States which have established legal community. He supported this rejection of American precedents by referring to the writings of some Louisiana jurists which emphasized the extent to which judicial

construction had imported common law precepts into Louisiana's civil law. In Justice Taschereau's view this adulteration of the Louisiana civil law makes precedents based upon it of doubtful value to the Canadian Supreme Court in interpreting Quebec's civil law.

But if this suggests some degree of civilian suspicion of possible common law encroachments in those aspects of Quebec's civil law pertaining to the institution of marriage, another case, Duchesneau v. Cook [1955] S.C.R. 207 points to a convergence of common law and civil law approaches in this area. This Quebec appeal involved the capacity of a married woman who was separate as to property to dispose freely of her moveables. Justices Fauteux and Taschereau wrote opinions for a unanimous Court and refused to give any wider interpretation of the civil capacity of a woman separate as to property than that specifically authorized by recent amendments to the Civil Code. In taking this position Justice Fauteux followed the common law principle that the legislature is not presumed to make substantial and radical changes to the law. However, while on the basis of this precept the civilian judges held that married women separate as to property had not been entirely released from the rule of relative incapacity affecting married women generally in the Province of Quebec, they adopted an approach similar to the common law doctrine of 'tracing' to establish the married woman's right to dispose of her property: where the married

woman had paid for the property out of her own savings, insurance monies received from moveables destroyed by fire and money borrowed from her father, she was considered to have the capacity to dispose of such property without the authorization of her husband. This treatment of the issue closely corresponds to the recent development of the common law position regarding a wife's interest in the matrimonial home. In Thompson v. Thompson [1961] S.C.R. 3 a majority of the Supreme Court's common law judges lead by Justice Judson incorporated some of the post-war English jurisprudence regarding ownership of the matrimonial home. Here again the question of the wife's proprietorial rights turned on the fact of the financial contribution by the wife in the purchase of the home. Whether the civilians in Duchesneau v. Cook were influenced by the developing common law doctrine in England, or whether Duchesneau v. Cook influenced the common lawyers in Thompson v. Thompson is open to speculation. However, the similarity of development in the treatment of somewhat parallel legal issues in the two traditions suggests that "common law" and "civil law" modes of reasoning, at

least as represented on the Supreme Court, may have more in common than popular discussion of their divergencies may sometimes imply.[1]

The custody of children is one dimension of family law which involved a fairly obvious clash of social values among the Supreme Court judges. There seems to have been no difference on the general principles of law to be followed by an appellate court in custody cases. The Court without dissent has accepted the rule that the general welfare of the child is the paramount factor and that the opinion of the trial judge who has had the advantage of observing the parties should not be readily upset by appellate courts. Thus in Bickley v. Bickley [1957] S.C.R. 329 an appeal from British Columbia, the Court, including Justice Fauteux and four non-Quebec justices, unanimously

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[1] Although not in the area of family law the case of Langlais v. Langley [1952] 1 S.C.R. 28 provides an example of a Quebec appeal which divided the Court on an important question of Quebec law - in this instance, the law of wills - but not apparently on common law-civil law lines. G.V.V.N. Nicholls commenting on the case in the Canadian Bar Review wrote that, "(H)owever much the civil and common law approaches to the judicial process may differ, the Langlais case certainly gives no support to the idea that the racial or legal background of a judge of the Supreme Court helps you to prophesy what answers he will give to a particular legal question." Canadian Bar Review, (1954) 979.

held that since it was impossible to determine that the trial judge had not made full judicial use of the opportunity given him of seeing and hearing the parties and, since he had not misdirected himself on any question, the trial judge's decision should be restored. Similarly in a Quebec appeal involving Article 214 of the Quebec Civil Code, Rochon v. Castonguay [1961] S.C.R. 359, again a unanimous Court, made up of the three Quebec judges[1], accepted the decision of the Court below that it was in the child's best interest to be left in custody of the father rather than the mother.

But two other cases in this general area did divide the Court on issues which went beyond these legal precepts, although it is questionable to what extent the division can be traced to the ethnic backgrounds of the judges. This is particularly questionable in the first case McKee v McKee [1950] S.C.R. 700 which raised a unique problem. In this case the California Court of Appeal had granted the parties a divorce and had assigned custody of the couple's one child to the appellant mother. But before the final decision was handed down the respondent father took the child to the Province of Ontario where he took up residence on a farm near Kitchener. The mother then brought an action for custody in the Ontario Courts. A Writ of habeas corpus was issued and heard before Mr. Justice Smiley who directed the

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[1]As this decision came on an application for leave to appeal, the usual quorum of five judges was not required.

issue of custody to be heard in a separate proceeding. The result of the second hearing was that it would be in the best interests of the infant to grant custody to the father. The issue argued before the Court of Appeal of Ontario was that the California court having jurisdiction, the Ontario courts had no right to hear the custody question de novo.

The majority of the Supreme Court of Canada, Justices Cartwright, Kerwin, Estey and Locke, held that the trial judge had erred in granting custody to the father. The minority, with Justice Kellock writing the dissenting opinion and Justices Taschereau and Fauteux concurring disagreed, above all, on the grounds that the Courts of Ontario had an overriding duty as parens patriae to concern themselves with the character of the parents in the interests of the child. Justice Kellock placed great stress on evidence contained in the Ontario trial judge's decision to the effect that the mother's behavior displayed "a looseness of public conduct and a lack of personal integrity and dignity which I think might provide a very unhappy background to the proper upbringing of the child."(at p. 735) In the minority's view this evidence justified the trial judge in reaching his decision that it would be in the best interests of the child to be brought up by the father. But the majority was less concerned with the Court's role as parens patriae: in its eyes the mother's apparent lesser qualification as a parent did not consitute as serious a consideration as the father's moving

from California to Ontario in order to avoid the law of the jurisdiction to which he had submitted. Although there was no disagreement on the proposition that the judgment of a foreign Court as to the custody of an infant was not binding, nevertheless the majority position manifested more concern for the preservation of comity between the courts of friendly jurisdictions than for securing the most beneficial domestic circumstances for the offspring of divorced parents. However, the fact that Justice Kellock wrote the dissenting judgment should qualify any attempt to explain the contrasting concern of Justices Fauteux and Taschereau for the family situation in terms of French-Canadian social priorities. Indeed if we were to try to link the opinions expressed on the minority side in this case with either of Canada's major ethnic division it would seem more reasonable to associate the expression of moral opprobrium directed at the mother's behavior by the trial judge and approvingly quoted by Justice Kellock with a rather conservative protestant Anglo-Saxon outlook as with French-Canadian attitudes.

The other case dealing with the custody of a child which provoked a significant split on the Court - and this time one which pitted three Anglo-Saxon judges against two French-Canadian judges - was Taillon v. Donaldson [1953] S.C.R. 257. This case touched on the funadmental question of the conditions under which natural parents should be given custody of their children. In three other cases, all Ontario appeals, Re Baby Duffell [1950] S.C.R. 737,

Hepton v. Maat[1] [1957] S.C.R. 606 and Re Agar [1958] S.C.R. 52, the Court had unanimously endorsed the basic principle that, whether a child is legitimate or illegitimate, if the natural parents are of good character and both willing and able to support the child in satisfactory surroundings they should be entitled to custody of the child notwithstanding that other persons who wish to do so could provide more advantageously for the child's upbringing. But in Taillon v. Donaldson [1953] S.C.R. 257 a Quebec appeal involving a similar question of custody, the civilian and common law judges split, with Justices Kellock, Estey and Cartwright constituting the majority and Justices Taschereau and Fauteux dissenting.

In this case the natural parents had placed a child at the time of its birth with its aunt and uncle and it had remained in their care for seven years. The child's natural parents lived in the same town as the aunt and uncle, were in constant contact with the child and although they treated the child in a friendly fashion, they showed no strong interest in taking their child back nor, aside from one gift of five dollars, did they contribute anything to its support - indeed, they even kept the child's family allowance. However, after seven years a family squabble developed and the natural father brought a Writ of habeas corpus for custody of the child. The trial judge

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[1] In Hepton v. Maat, Justice Locke dissented but not in principle: he was prepared to reverse the provincial Court of Appeal on the facts.

dismissed the Writ but was reversed by the Quebec Court of Queen's Bench.

At the centre of the legal dispute in this case was the question of how to apply to this particular situation the general principle enshrined to Article 243 of Quebec's Civil Code that the child remains under the authority of his parents until he comes of age. There were a number of previous decisions by the Quebec courts and the Supreme Court of Canada stipulating the circumstances under which deviations from the authority of natural parents over their children were legitimate. The two groups of Supreme Court justices differed essentially on whether in this particular case the circumstances were such as to justify not following the general prescription of the Quebec Civil Code that children should be brought up in the home of their natural parents.

In analyzing the basic differences in the reasoning which led the two groups of judges to opposite answers to this question, two points stand out. First, there was a contrast in the authorities which each side emphasized and secondly a contrast in the moral policies derived from these authorities. The two Quebec judges found the governing formulation for this case in the decisions[1] of Quebec courts,

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[1] Justice Fauteux also cited some Supreme Court Decisions but he relied on Marshall v. Fournelle for the basic rule to be applied in this case.

especially the judgment of Mr. Justice Rivard in Marshall v. Fournelle Q.R. (1926) 40 K.B. 391, at 395, where he said that it was when the parents were "incapables or indignes" of exercising their parental authority that children could be justifiably placed elsewhere. Since in their view there had been no evidence showing that the child's parents were either incapable or unworthy of acting as parents for the child, they concluded that the child should be returned to his natural parents. Now supporting this approach to the case, in both their own judgments and those judgments which they quoted, was the moral philosophy in which the family is seen as an institution sanctioned by natural law. Justice Taschereau began his judgment by declaring that Article 243 of the Civil Code consecrated "la loi naturelle" and cited the opinion of Mr. Justice Demers of Quebec in Maquin v. Turgeon Q.R. (1912) 42 S.C. 232 to the effect that, "Le père, et la mère à son défault, ont d'après le droit naturel droit à la garde de leur enfant." Neither Justice Taschereau nor Justice Fauteux denied that removing the child from the home in which he had spent all of his seven years and returning him to his natural parents, who admittedly to date had not shown a great deal of affection for him, would subject the child to certaines "désadvantages" (Justice Fauteux) which might temporarily adversely affect the child's "confort matériel" (Justice Taschereau), but in their view these rather prudential objections to the transfer of the child were not strong enough to override the natural law sanctions for

keeping children with their families. Thus they could conclude that "l'intérêt de l'enfant" was not imperiled as a result of this transfer for they interpreted the child's interests in moral terms according to the precepts of natural law.

But the three Anglo Saxon judges did not interpret the child's interest in this fashion nor did they base their judgments on the same Quebec authorities. They relied primarily on earlier Supreme Court decisions which put the greatest stress on the interest of the child as the governing criterion in these disputes. These judgments did not stipulate that the parents must be shown to be "incapable ou indigne" of exercising their parental responsibilities before being deprived of a child. Their conclusion that the child's interest required his being left in the home of his aunt and uncle was based above all on the trial judge's feeling that the natural parents had not shown any real affection for the boy. Justice Cartwright was also impressed by the uncontradicted evidence of a doctor who at the trial expressed the opinion that the boy's "removal from the only home he has ever known to that of his parents would cause him grave injury." Clearly to these three judges the child's interest was to be interpreted by a rather utilitarian test rather than by the precepts of natural law.

We have taken some pains to set out the difference between the two sides of the Court in Taillon v. Donaldson

for this case was perhaps the cause célèbre in the post-1949 period for those Quebec jurists who object to the opportunity which the Supreme Court gives to a majority of common-law judges to override the opinion of civil law judges both in Quebec and on the Supreme Court on questions pertaining to Quebec's Civil Code.[1] However, before accepting the case as a crystal clear instance of a "common law" view prevailing over the "civilian" treatment of a point in Quebec's civil law, two qualifying points should be made. First, it should be noted that the trial judge with whom the Supreme Court majority agreed was, of course, a civilian jurist and although his decision was reversed by the Quebec Court of Queen's Bench his agreement with the three non-Quebec Supreme Court judges at least suggests that their opinions were not necessarily the product of their common law background. Secondly, while it is true that Justices Kellock, Estey and Cartwright did not attach the same weight to the Quebec authorities as did Justices Taschereau and Fauteux, still it would surely be questionable to regard the authorities they did cite as completely alien to the Quebec's civil law tradition. The judgments which they chiefly relied upon were those of Justice Rinfret (as he then was) and Justice

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[1] See, for instance, Léon Lalande, "Puissance paternelle-Déchéance-Droit civil et jurisprudence de Québec-Composition de la Cour Suprême du Canada." 33 Canadian Bar Review (1955) 950 and Edward McWhinney, Canadian Jurisprudence p. 9.

Cannon in Dugal v Lefebre [1934] S.C.R. 501 and Justice Rinfret in Stevenson v. Florant [1925] S.C.R. 532.[1] All these judgments were given by civilian jurists - which again might lead one to challenge the assumption that on controversial points of law there are fixed civil law or common law positions.

Looking back over the Court's recent decision in cases raising important questions concerning the family, it would seem appropriate to conclude that bicultural factors have had little if anything to do with the Court's decision-making. There was some slight evidence of a competition between civil law and common law approaches to family law issues in M.N.R. v. The Royal Trust Company and in Taillon v. Donaldson and some suggestion of a clash of cultural values in the McKee case and, more strongly, in Taillon v. Donaldson.

But even in the latter instance where the two French-Canadian judges avowed a natural law conceptof the sanctity of the family institution whereas their English Canadian colleagues applied a more prudential test to determine the interests of the child whose future was at stake, is it clear that this represents a bicultural division of opinion? The identification of the contrasting moral policies with

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[1] It is interesting to note that both Justices Estey and Fauteux quoted the same passage from Justice Rinfret's judgment in the Stevenson case - except Fauteux added to what Estey quoted a dictum of an English authority to the effect that "The normal well ordered home is unquestionably preferable to the foster home, however well ordered."

ethnic culture patterns would seem clearest on the French-Canadian side where it is reasonable to associate the natural law view of the family with Catholic moral theology. Thus to the extent that French-Canadian culture subsumes Catholic moral values, the position adopted by Justices Taschereau and Fauteux as well as by the Quebec jurists whose opinions they cited might be linked to the judges' ethnic background. However, there is now much evidence to suggest that there is no longer a complete overlap of French Canadian society and Catholicism. It may be that the civil law and judicial institutions of French Canada remain relatively firm custodians of Catholic moral values. In that case what we might be witnessing in disputes like the one under consideration (and others which we will analyze in the civil liberties field) is not only a conflict between French Catholic and more secular utilitarian values on the Supreme Court bench but also, in the case of French-Canadian judges, evidence of a widening cleavage between values enshrined in Quebec's established legal tradition and changes taking place in the structure of

French-Canadian society. Under conditions of fairly rapid social change, (such as Quebec has been experiencing in recent years) judicial appointees, who hold office for life may manifest values which to an increasing degree are in tension with changes taking place in their own society.[1]

4. Civil Liberties in Quebec

In the 1950's the Supreme Court of Canada was confronted with a series of Quebec appeals which centred on collisions between Quebec authorities and the claims of private groups or individuals within Quebec to the enjoyment of certain rights and freedoms. In the process of deciding these cases not only did the Court have the immediate responsibility of adjudicating disputes between the popularly elected Quebec Government and certain minorities in the province but also the Court (in at least some of these cases) had to determine, for the first time, questions of fundamental importance to the position of civil liberties

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[1] A vivid example of this in French Canada was provided by the recent outburst of Chief Justice Dorion of Quebec against the secularization of text books in Quebec schools. The Globe & Mail, Nov. 24th, 1965.

within the Canadian federal system.[1] As we have shown in the quantitative part of this study it was this series of cases which, in so far as "potential bicultural issues" were concerned, was the most significant source of the Supreme Court's reversals of the Quebec Court of Appeals[2] and of those divisions of the Supreme Court's judges which found the French-Canadian judges dissenting against an Anglo Saxon majority.[3] Thus here we must explore these decisions in more detail to see what kind of value conflicts the cases entailed and how the Court's resolution of these conflicts affected the rights and interests involved.

Taking these cases in chronological order the first one was Boucher v. The King [1951] S.C.R. 265. The case concerned a Jehovah's Witness who had been convicted of seditious libel under the federal Criminal Code for distributing in a rural area of Quebec a pamphlet entitled "La Haine ardente du Québec pour Dieu, pour Christe et pour la liberté est un sujet de honte pour tout le Canada." On

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[1] The one occasion before 1949 which provided the Court with an opportunity to deal with the question of how the federal division of powers affects the capacity of the two levels of government to enact legislation restricting important civil liberties was in the Reference Re Alberta Statutes [1938] S.C.R. 100 .

[2] See above, pages 297-300.

[3] See above, pages 331-332; 344-345; 350.

the immediate question of whether the trial judge had erred in directing the jury, the Supreme Court without dissent[1] agreed with the dissenting minority of Quebec's Court of King's Bench that the judge had misdirected the jury. But on the larger issue of whether there was sufficient evidence upon which a jury could conclude that the accused had committed a seditious libel, the Court was divided: 5 judges, Justices Kerwin, Rand, Kellock, Estey and Locke, found that the pamphlet in question did not provide evidence of sedition and consequently held that Boucher should be acquitted, while on the other side, Justice Cartwright together with the three French-Canadian judges, thought there was sufficient evidence and would have ordered a new trial.

With eight judges writing separate opinions (Justice Fauteux concurred with Justice Cartwright) it is not easy to summarize the essential points of disagreement between the majority and the minority in this case. However, two main points stand out. The first concerns the test of what constitutes a seditious libel. Here perhaps the outstanding feature of the Court's decision was the fact that the Court's majority "removed a rather vague idea that merely saying or writing something that might stir up feelings of ill-will between different classes of subjects constituted sedition in itself, whether or not there was an intention to incite

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[1] Although Chief Justice Rinfret disagreed with some of the reasons with which the 2 dissenting Quebec judges supported their conclusion.

to violence."[1] It should be noted that Justice Cartwright who spoke for Justice Fauteux agreed with the majority on this point, and inferentially Justice Taschereau also subscribed to the view that an expression of opinion which is calculated to promote feelings of ill-will" is not seditious unless, in addition, it is "intended to produce disturbance of or resistance to the lawfully constituted authority" (p.283). Only Chief Justice Rinfret stood apart from his colleagues on this point; he refused to admit the relevancey of English authorities to the filling out of the definition of sedition in the Criminal Code and by implication accepted a much wider definition of sedition - one which was certainly wide enough to enable him to conclude "without hesitation" that statements in the pamphlet were seditious libels. Justice Cartwright supported by his two Quebec colleagues, based his dissent on that part of the Jehovah's Witness pamphlet which attacked the Quebec courts charging that they were all controlled by Roman Catholic priests. In the minority's view this was evidence of a seditious intention to bring the administration of justice into hatred or contempt or to excite disaffection against it. Against this view the majority insisted on a narrower test of sedition which would require evidence of an intention to incite people to violence against the administration of justice.

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[1] F.R. Scott, Civil Liberties and Canadian Federalism, (Univ. of Toronto Press, 1959) p. 38. For further comment see also D.A. Schmeiser, Civil Liberties in Canada (Oxford Univ. Press, 1964) pp. 205-215.

In the process of working out their definition of sedition the members of the majority expressed an underlying interest in ensuring that the crime of sedition be not interpreted in a way which would seriously curtail the give and take of contentious debate so essential to a liberal democracy. Justice Rand was the most articulate exponent of this theme, asserting that

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality (p. 288).

And Justice Cartwright (with whom Justice Fauteux concurred) similarly objected to interpreting a seditious intention as "an intention to promote feelings of ill-will and hostility between different classes of subjects" on the grounds that such a definition "would very seriously curtail the liberty of the press and of individuals to engage in discussion of any controversial topic"(p.333). The main divergence here was in Chief Justice Rinfret's opinion. The Chief Justice went out of his way to express the reverse concern for not interpreting freedom of speech so widely as to endanger public order. He concluded his judgment with the following statement:

> I would not like to part this appeal, however, without stating that to interpret freedom as licence is a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as was said elsewhere, "there must be a point where restriction

> on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation." (p. 277).

Now this certainly represents a contrasting value-orientation in balancing freedom and order than that manifested in the six opinions written by English-speaking judges. However, we must remember that Justices Fauteux and Taschereau accepted the liberal element in Justice Cartwright's judgment. On an ethnic basis perhaps, the significant point of contrast lies in the active concern and enthusiasm shown by all of the English-speaking judges for spelling out the need to evolve an interpretation of sedition narrow enough to leave ample room for contentious and radical public debate and discussion.

It may be that a sharper divergence of values or philosophies is to be found in the judges' assessments of the integrity of the Jehovah's Witnesses' religious convictions than in their definitions of sedition. On this second point of contrast, it is clear that the five judges who held that there was insufficient evidence to warrant having a new trial were not prepared to consider as ludicrous or incredible the Witnesses' claim that their pamphlet by moving its readers to adopt "the principles of Christianity" was intended in good faith to remove the sources of friction between their sect and its "persecutors" in Quebec. The minority's tacit unwillingness to accept this defence suggests the contrary

feeling that the Jehovah's Witnesses' stated intentions could not be taken at face value. In so far as the three French-Canadian judges were concerned their reluctance to accept the "good faith" of the Jehovah Witnesses may well have stemmed from their reaction as Quebec Catholics to the abusive language directed by the pamphlet against both the Catholic Church and public officials in Quebec. And certainly it would seem likely that these judges were not in sympathy with the tendency of the majority's approach in so far as it "narrowed the scope of seditious libel to the point where it could not serve as a weapon to restrain the possible excesses of the Jehovah's Witnesses."[1]

Two years later in Saumur v. Quebec and A.G. Quebec [1953] 2. S.C.R. 299, the same nine judges divided in the same way again on an issue involving the Jehovah's Witnesses' attempts to distribute their rather volatile literature in Quebec. On this occasion, Saumur, a member of the sect had challenged the constitutional validity of a Quebec City by-law passed under the Charter of the City of Quebec, prohibiting the distribution in the streets of any book, pamphlet or tract without the permission of the Chief of Police. Saumur lost his case at the Superior Court level and before

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[1] J.T.Eyton, "Jehovah's Witnesses and the Law in Canada" 17 Faculty of Law Review (1959) 96. Note that in an earlier Quebec decision, Duval v. R. (1938) 64 Quebec K.B. 270 the Jehovah's Witnesses were convicted of seditious libel.

the provincial Court of Appeal.

Before the Supreme Court Saumur was more successful- at least on the immediate issue. Four of the judges, Rand, Kellock, Estey and Locke, held that the by-law was legislation in relation to freedom of religion and freedom of the press and that since these freedoms were not civil rights or matters of a local or private nature in the province, the by-law was beyond the legislative power of the Province. But the deciding opinion was rendered by Justice Kerwin who, although he took the reverse position on the vital constitutional point and held that the right to practice one's own religion was a civil right under provincial jurisdiction, nevertheless found that the by-law clashed with the provisions of Quebec's Freedom of Worship Act and therefore could not operate so as to prevent Saumur from distributing his tracts. While this meant that Saumur's appeal was successful, it also marked the failure of the Court's phalanx of English-speaking liberals to establish as a governing precept of Canada's constitutional law that it was beyond the reach of provincial legislative power to curtail such vital freedoms as freedom of worship and freedom of speech.[1]

For the opinions of the four dissenting judges when put together with Justice Kerwin's provided a majority for

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[1]For the full implications of this aspect of the decision see Bora Laskin, "Our Civil Liberties - The Role of the Supreme Court." 41 Queens Quarterly (1955) 455 and "An Inquiry into the Diefenbaker Bill of Rights" 37 Canadian Bar Review (1959) 77.

the negative proposition that legislation affecting freedom of worship and the press was not in itself a prosribed area of provincial legislation. Chief Justice Rinfret and Justice Taschereau based their decision on the ground that the pith and substance of the by-law in question was not the restriction of the freedom to express religious beliefs but rather the regulation and use of the streets - a subject-matter of legislation clearly subject to provincial jurisdiction. However, they went further than this and stated that freedom of worship as a subject matter of legislation lay within the jurisdiction of the provinces. Justices Cartwright and Fauteux refused to consider a restriction of free speech or freedom of worship as a distinctive subject-matter of legislation for the purpose of determining its constitutional validity. Restrictions on civil liberties in their view could only be incidental effects of Dominion or provincial legislation and in this case the provincial legislation of which they were an incidental effect was well within the Province's jurisdiction.

What stands out in this division of opinion is the vigorous interest shown by the four common law judges, led by Justice Rand, in safeguarding essential civil rights of minorities and individuals within the provinces from infringement by provincial majorities. Justice Rand had launched his crusade to derive Constitutional protection for the enjoyment of civil liberties in the provinces, two years earlier in the case of Winner v. S.M.T. (Eastern) Ltd.

and A.G. N.B. There he had expounded the doctrine that Canadian citizenship carried with it certain rights, including the right to use the highways, which could not be abrogated by a province. In the Saumur case following the path originally marked out by Chief Justice Duff in Reference Re Alberta Statutes [1938] S.C.R. 100 and supported by his three colleagues, Estey, Kellock and Locke, he cited the assertion in the preamble of the B.N.A. Act that Canada is to enjoy "a Constitution similar in principle to that of the United Kingdom" as grounds for holding that the freedom of discussion and debate which are essential conditions for the operation of parliamentary democracy cannot be validly curtailed by provincial legislation.

That this activist, liberal approach to Constitutional interpretation failed to command the allegiance of the whole Court clearly cannot be entirely explained in bicultural terms. Not only is there the fact that Justices Kerwin and Cartwright rejected it, but further, given the positivist and self-restrained posture which has traditionally characterized jurists in common law Canada,[1] it would seem unlikely that the policy pursued by the quartet of common law "liberals" would be uniformly popular with the English-speaking profession. Still it cannot be denied that the three French-speaking judges constituted the indispensible nucleus of that group of judges which rejected the attempt

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[1] See Horace E. Read, The Judicial Process in Common Law Canada 37 Canadian Bar Review (1959) 265, and above pp. 143-151 & 407.

to establish constitutional guarantees of basic civil liberties by judicial construction.

Further, the Quebec jurists, unlike Justices Cartwright or Kerwin, tended in their opinions to show a positive interest in finding Constitutional support for the measures adopted by Quebec authorities to curtail the activities of the Jehovah's Witnesses. This is most evident in the following passage of Chief Justice Rinfret's judgment (concurred in by Justice Taschereau) where he exclaimed:

> Qui oserait prétendre que des pamphlets contenant les déclarations qui précedent, distribués dans une cité comme celle de Québec, ne constituerent pas une pratique incompatible avec la paix et la sureté de la Cité ou de la province? Quel tribunal condamnerait un conseil municipal qui empêcherait la circulation de pareilles déclarations?

And he concluded by answering his own question with the emphatic statement that,

> ... une municipalité, dont 90 pour cent de la population est catholique, a non seulement le droit, mais le devoir d'empêcher la dissemination de pareilles infamies. (p. 318).

Also, it is significant that Chief Justice Rinfret and Justice Taschereau, unlike the rest of their colleagues, were unwilling to look upon the Jehovah's Witnesses' proselytizing activities as having anything to do with freedom of religious worship. As Chief Justice Rinfret put it, "les pamphlets on tracts qu'elle insiste a distribuer sans autorisation ont un caractere provocateur et injurieux, ne sont pas des gestes religieux mais des actes anti-sociaux ... " (p. 304).

Certainly the extent to which the approach adopted by Justice Rand and his three colleagues of putting the regulation of freedom of speech and worship beyond provincial

jurisdiction clashed with the interests of the Quebec government of the day was demonstrated by the speed with which the Duplessis Government in Quebec took advantage of the loop-hole opened up for them by Justice Kerwin's judgment and amended the Freedom of Worship Act so as to clearly exclude the Jehovah's Witnesses from its protection. The day after this statute came into force Saumur instituted an action to have it declared ultra vires. The Superior Court held the statute intra vires but the provincial Court of Appeal without passing on the Constitutional question dismissed the action on the ground that, since Saumur had not actually been deprived of the right to distribute Jehovah's Witness literature, the case did not involve a real dispute or lis but only an academic question. It is interesting to observe that in Saumur et al v. Procureur Général de Québec et al [1964] S.C.R. 252, The Supreme Court with Chief Justice Taschereau writing the opinion for a unanimous and full court, upheld the decision of Quebec's Court of Appeal. But this was a Supreme Court of which the liberal quartet of the 1953 Saumur decision, Justices Rand, Estey, Kellock and Locke, were no longer members - a fact which would seem to have more than a little to do with the Court's total unwillingness to seize upon this occasion to define the limits of provincial power in circumscribing expressions of religious belief.

Two Quebec appeals in 1955 raising questions

affecting freedom of religion and minority rights, elicited unanimous responses from the Supreme Court and each case resulted in reversals of Quebec's highest appellate Court. These two decisions thus point to the common demoninator of Supreme Court opinion on questions of civil liberties in Quebec and suggest that Chief Justice Kerwin who had replaced Chief Justice Rinfret was working with a little more effect than had his predecessor at avoiding the radical disunity and fragmentation which had characterized the Court's decisions in the Boucher and Saumur cases.

First in Henry Birks & Sons (Montreal) Ltd. and Others v. City of Montreal and A.-G. Que. [1955] S.C.R. 799 the Court unanimously held that it was beyond the competence of the provincial government in Quebec to pass legislation allowing municipalities to promulgate by-laws for the closing of stores on New Year's Day, the Festival of Epiphany, Ascension Day, All Saints' Day, Conception Day and Christmas Day - all Roman-Catholic religious holidays. The main opinion was Justice Fauteux's with which Chief Justice Kerwin and Justices Taschereau, Estey, Cartwright and Abbott concurred. Justice Fauteux based his conclusion that the Quebec legislation was ultra vires on the same grounds as that advanced by the Superior Court judge and the dissenting pair of judges on Quebec's Court of Queen's Bench - namely, that the legislation in question belonged, like Sunday observance legislation, in the domain of Criminal Law and as such was subject to the national legislature's exclusive jurisdiction

under Section 91 (27) of the B.N.A. Act. However, the other three judges, Rand, Kellock and Locke added to this Criminal Law argument the broader liberal contention that the legislation was beyond the jurisdiction of the province because it was legislation with respect to freedom of religion.

While the approach initiated by Chief Justice Duff and pursued by Justice Rand which would, in effect, find an implied Bill of Rights in the B.N.A. Act found even less support on the Court's bench in this case than it had in the Saumur decision, still against this, should be balanced the fact that the decision provided a firm endorsement of the Criminal Law justification for putting compulsory religious observance beyond the Provinces' powers. As D.A. Schmeiser has pointed out:

> The potentialities of this decision are immense. It is noteworthy that some of Canada's leading authorities on constitutional law have concluded that religious freedom is within federal competence under the criminal law power, and rely strongly on the Birks decision.[1]

It is ironical that the approach which seemed most capable of uniting French and English-speaking members of the Court - namely, the inclusion of freedom of religion in the Criminal Law power - while as restrictive of provincial power as the Duff-Rand doctrine, was, potentially, much more generous to federal power than the implied Bill of Rights position. While Chief Justice Duff, Justice Rand and those other common law judges who endorsed their approach, had only employed it to deny provincial competence to limit vital

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[1] Above, page 438, footnote 1, p. 86.

freedoms they had not ruled out the possibility that the same doctrine might be used to restrict the Dominion Parliament's power in this field. But the Criminal Law approach appeared to leave freedom of religion completely under federal control.

There is one interesting qualification to this aspect of the case. Justice Fauteux towards the end of his judgment (concurred in, it should be recalled by five other judges) threw open the question, without determining it, of whether the terms of the Quebec Act of 1774 granting Roman Catholics in Quebec the free exercise of their religion, ". . . ont l'effet de restreindre, dans son exercise, le pouvoir général subséquement attribué exclusivement au Parliament par le paragraphe 27 de l'article 91...(p.809)." Perhaps there is some evidence here of a bicultural divergence between the sources from which the French-Canadian jurist like Justice Fauteux, on the one hand, and Justice Rand and his English-speaking liberal colleagues on the other would derive the prime social values to be secured by judicial interpretation. Whereas Justice Rand and his supporters have articulated their premises in terms of the values of [illegible] individual expression inherent in the British parliamentary tradition, Justice Fauteux looks to the historic rights of the French Catholic community in British North America as a possible reservoir of fundamental freedoms.

The second 1955 decision involving a question of

freedom of religion which found the Court undivided at least on the disposition of the appeal was Chaput v. Romain et al [1955] S.C.R. 834. The Court's unanimity is all the more interesting in as much as it was the first of a series of three disputes in which the Supreme Court, reversing the Quebec Appeal Court, upheld actions initiated by Jehovah Witnesses against Quebec authorities and in the latter two of which - the Roncarelli and Lamb cases of 1959 - all three of the Court's civilian judges dissented from the Court's decision. Thus the Chaput case, like the Birks case points to the consensus of opinion which may exist on the Supreme Court with respect to civil liberties. The decision, in this instance, indicates the circumstances under which both Quebec and non-Quebec judges are likely to agree in interpreting the law governing public authorities so as allow an action for civil remedies by persons who consider themselves to have been deprived of a fundamental civil right.

The Court was certainly assisted in reaching a unanimous determination of the Chaput case by the extremely arbitrary character of the police behavior involved. Three Quebec provincial police officers, acting on instructions from their superiors, broke up an admittedly orderly religious meeting of Jehovah Witnesses in Chaput's home, confiscated a quantity of religious literature and ordered all present to disperse. The entry and seizure were made without warrant and at no time was any charge laid against any of the

participants in the meeting. The only excuse offered for this procedure was the officers' belief that the Jehovah's Witnesses were seditious.[1]

The crux of the Court's decision was that the officers had not acted in good faith, (indeed the majority held that they acted illegally) and therefore, they could not enjoy the special, statutory privileges they had successfully involved before the Quebec courts, for this statutory protection only applied to an officer who "has acted in good faith in the execution of his duty." It is significant that Justice Taschereau whose opinion was supported by Chief Justice Kerwin and Justices Estey, Fauteux, Cartwright and Abbott,[2] in defending his view that the officers' act was "reprehensible" displayed the gulf between his own evaluation of religious freedom and that of the members of the majority of Quebec's Court of Appeals. Whereas Justice Bissonnette of the latter Court had supported the police officer's raid on the Jehovah's Witness meeting with the contention that, "Tous savaient qu'ils (i.e. the Jehovah's Witnesses) étaient honnis du Québec et il n'y a rien de changé a leur égard (p.852)",

[illegible]

[1] At the time of the raid the Quebec Court of Appeal had ruled that the pamphlet impugned in the Boucher case was a seditious libel. The Supreme Court had not yet reversed that decision.

[2] Justices Fauteux and Abbott also wrote short concurring opinions of their own.

Justice Taschereau supported his condemnation of that raid by the following affirmation of the Jehovah's Witnesses' right to freedom of worship, "... Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'équalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autre adhérents des diverse dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses religieuses à une majorité. (p. 840)"

The one possible point of bicultural cleavage in the Supreme Court's approach to this case lies in the difference between the reasons advanced by Justice Kellock (who was the one other judge besides Justice Taschereau to write a lengthy judgment) and those advanced by Justice Taschereau for holding that Quebec's Magistrate's Privilege Act did not grant an immunity from civil wrongs to those subject to its provisions. While Justice Taschereau was content to simply postulate this as a precept of Quebec's civil law based on Article 1053 of the Civil Code, Justice Kellock (with Justice Rand concurring) endeavoured to strengthen this interpretation of the Quebec statute by arguing that since it was originally derived from an English statute its background was not the civil law but English common law, one precept of which was, as Dicey put it in his Law of the Constitution, that " . . . every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justifications as any other citizen." In developing this rationale Justice Kellock indicated that he

might be willing to go much further than the civilian judge, Justice Taschereau, in reading the prescriptions of the Anglo-Saxon Rule of Law ideal into statutes governing Quebec's public authorities. Justice Kellock crystallized this potential source of cleavage when he stated that

> Questions which concern the relation of the subject to the administration of justice in its broadest sense are part of the public law and, therefore, governed by the law of England and not by that of France... (p. 854)

The clearest test of the Court's attitude to the issue of free speech and also its most significant confrontation with the political values of the Duplessis government in Quebec was provided by the fifth case in this series, Switzman v. Elbling and A.-G. Que. [1957] S.C.R. 285. The central question in this case was the constitutional validity of Quebec's Communistic Propaganda Act, (the so-called "Padlock Law") passed in 1937 to prevent the propogation of communism. Perhaps the most important fact about the Supreme Court's decision in this case is simply that, with only one dissenting vote (Justice Taschereau), it ruled the Act invalid. In so doing it accomplished that which many Canadians, both within and outside Quebec, had for years been pressuring the Federal Government to do through its power of disallowance. Also the Court's majority once again reversed the majority of Quebec's Court of Queen's Bench.[1]

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[1] Also in an earlier case, Fineberg v. Taub (1940) I D.L.R. 114, the Act had been upheld by Chief Justice Greenshields of the Quebec Superior Court.

Looking more closely at the Court's decision, two points of interest emerge. First, as for the grounds of the majority's decision, it is significant that five judges, (Chief Justice Kerwin, and Justices Fauteux, Cartwright, Locke and Nolan) based their judgment that the Act was beyond provincial powers solely on the Criminal Law viewpoint. In their view the Act in "pith and substance" was in respect to Criminal Law and consequently within the exclusive jurisdiction of the Parliament of Canada. But the other three members of the majority took the more activist, civil-libertarian approach and held that the statute constituted an unjustifiable interference with freedom of speech. Here again it was the declaration in the preamble of the B.N.A. Act that Canada's constitution was to be "similar in principle to that of the United Kingdom" which was cited as the Constitutional foundation for this position. In Justice Rand's words, this declaration implies a system of "... parliamentary government, with all the social implications,... This means ultimately government by the free public opinion of an open society, ..."(p.306) Justice Abbott pushed this doctrine for the first time to its final conclusion and on the basis of it declared that, "... The power of Parliament itself could not abrogate this right of discussion and debate." (p.328)

Inspiring as the judgments of this trio of judges may have been to those who are enthusiastic about the use of judicial review to secure what they deem to be fundamental

liberties from legislative encroachment, such civil libertarians would have to be sobered by the fact that again it was the Criminal Law approach and not the implicit Bill of Rights theory which the Court's majority endorsed. Indeed the decision indicates that the broad civil liberties jurisprudence of which Justice Rand was such an articulate exponent was losing ground on the Supreme Court during the 1950's. Of the four judges who had supported the Duff-Rand preamble doctrine in the Saumur case, one, Justice Estey, had deserted this approach for the Criminal Law approach in the Birk's case and his replacement, Justice Nolan, in this case also confined himself to the Criminal Law rationale. A second member of the Saumur quartet, Justice Locke, while he had supported Justice Kellock's rather vague allusion to the broader civil liberties position in the Birks case, now in the Switzman case chose not to concur in either Justice Rand's or Justice Kellock's opinion and instead concurred with Justice Nolan. Thus it was clear by the Switzman case that the aspect of civil liberties upon which all of the Court's members could agree was simply that provincial legislation could not validly restrict a fundamental freedom if, in essence, the legislation was creating a new category of criminal activity. It should be noted that even Justice Taschereau, the sole dissenter accepted this constitutional principle in the Switzman case as he had in the Birks case.

This brings us to the second point of interest,

Justice Taschereau's dissent, which reflects above all a deep anti-communist sentiment. Justice Taschereau, while, as we have noted, accepting the Criminal Law formulation of the constitutional question, denied that the Act in question was criminal law. Instead he characterized the law as one dealing essentially with the regulation of property to protect society "contre tout usage illegal". And although it was essential to his argument to contend that the legislature "... n'a nullement donné le caractère de criminalité a la doctrine communiste" (p. 294) he was convinced that if the province could adopt laws designed to suppress conditions which might lead to crime it must also have, "... le pouvoir de décréter que ceux qui prêchent et écrivent des doctrines de nature à favoriser la trahison, la violation des secrets officiels, la sédition, etc., soient privés de la jouissauce des immeubles d'ou se propagent ces théories destinées à saper à ses bases et renverser l'ordre établi."(p. 299) Here there is the clear implication that communist political activity because of the crimes to which it might lead can be legitimately outlawed.

We might compare the Court's division in the Switzman case with the approach its members took in Smith and Rhuland Limited v. The Queen [1953] 2 S.C.R. 95. Although the latter case, involving an appeal from the Supreme Court of Nova Scotia, does not belong to this series of Quebec civil liberties cases, we introduce it here because it was the one other case in the period under consideration which provided

some reflection of the judges' attitudes to communism and the rights and freedoms which its exponents ought to enjoy in Canadian society. The case involved a Labour Relations Board's refusal of certification to a union on the sole ground that its acting secretary-general was a communist and exercised a dominant influence in the operation of the Union. There was general agreement that the Labour Relations Board had a discretionary power to grant certification but the judges split on the question of whether the Board had exceeded the limits of its discretion when it based its decision on the political affiliations of one of the Union's leaders. The majority consisting of Justices Kerwin, Rand, Kellock and Estey held that the communist associations of trade unionists were not among the Board's proper concerns and that therefore the Board had exceeded its jurisdiction. The minority, consisting of Justices Cartwright, Fauteux and Taschereau, dissented from this view and held that the communist leadership of the Union was not an extraneous consideration in the exercise of the Board's discretion.

Justice Rand's judgment in the Smith and Rhuland case expressed an acute sensitivity to the issues which were being so dramatically raised by McCarthyism in the United States. The key to his judgment was his willingness to treat communists on the same plane as the other political movements which compete for power in a liberal democracy. He argued that one of the basic considerations shaping legislative policy in Canada was that,

> ...The dangers from the propagation of the communist dogmas lie essentially in the receptivity of the environment. The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole: but how can that state of things be advanced by the action of a local tribunal otherwise than on the footing of trust and confidence in those with whose interests the tribunal deals? Employees of every rank and description throughout the Dominion furnish the substance of the national life and the security of the state itself resides in their solidarity as loyal subjects. To them, as to all citizens, we must look for the protection and defence of that security within the governmental structure, and in these days on them rests our immediate responsibility for keeping under scrutiny the motives and actions of their leaders. (pp. 99-100)

Rand's insistence that Canadian citizens merely because they are communists must not have their rights adversely affected certainly contrasts with Justice Taschereau's lower degree of tolerance for Communism as manifested in the Switzman case and with the dissenting position of Justices Cartwright, Justices Taschereau and Fauteux here in the Smith & Rhuland case. But here again there are obvious reasons for resisting a simple bicultural explanation: a refusal to extend the open society freedoms to communists has been evident in many sections of North American society in the post-war and cold war years, and within Quebec there were certainly many who were hostile to attempts to outlaw the Communist party. However, it may be that the particular stratum of French-Catholic society from which the Supreme Court's French-Canadian members were drawn was especially prone to accept limitations on the political freedoms of communists. This is a point which we shall take up again in concluding this section.

The final two cases in this series, Roncarelli v.

Duplessis [1959] S.C.R. 121 and Lamb v. Benoit [1959] S.C.R. [1959] S.C.R. 321 climaxed the litigation arising out of the Quebec government's efforts to terminate the proselytizing activities of the Jehovah's Witnesses. The Supreme Court's handling of these two cases brought the situation back full circle to that which obtained when the Jehovah's Witnesses first brought their complaints against Quebec authorities to the Supreme Court in the Boucher and Saumur cases in the early 1950's. In both the Roncarelli and the Lamb case the Supreme Court's majority upheld the Jehovah's Witnesses' actions against the Quebec authorities, reversed the Quebec's highest court of appeal and rejected the arguments advanced by the Court's French Canadian members.

The Roncarelli case was the most spectacular of the two cases and attracted a considerable amount of public attention. Indeed given the fact that the respondent in the case was Quebec's Premier, Maurice Duplessis, it is likely that of all the cases coming before the Court since it became Canada's final court of appeal in 1949, the Roncarelli case was the one which attracted the most national attention. Hence the Court's treatment of the dispute had ramifications extending beyond its immediate effect on the interests of the Quebec contestants - ramifications which had a real bearing on the Court's image as a decision-making agency whose work could have an impact on national political interests.

The Roncarelli case arose out of an action brought by

Roncarelli, the owner of a Montreal restaurant, against Duplessis for damages resulting from the cancellation of his liquor license by the Quebec Liquor Commission. There was no serious question as to the fact that Duplessis in his capacity as Attorney-General had intervened and instructed M. Archambault, the Liquor Commissioner, to cancel Roncarelli's license. Nor was there any real doubt about the motive which prompted Duplessis's intervention. Roncarelli, a member of the Jehovah Witness sect, had been providing bail for a large number of his co-religionists charged with infractions of municipal by-laws for distributing their pamphlets. When this was brought to Duplessis's attention by M. Archambault, the Premier decided that Roncarelli should not enjoy the privileges of a Quebec liquor permit if he was using the profits made possible by this permit to thwart the efforts of municipal and provincial authorities to clamp down on the Jehovah's Witnesses. The real question was whether Duplessis's intervention was illegal and led to an actionable wrong and further whether, if it was illegal, Duplessis was protected by Article 85 of Quebec's Code of Civil Procedure which required that notice be given within a month of the event as a condition for bringing an action for damages against a public officer for an act done by him in the exercise of his functions. This notice had not been given.

From our perspective the interesting aspect of the division of opinion on the Court in answering these questions was the extent to which the position of the majority

consisting of five common law judges (Chief Justice Kerwin, Justices Rand, Martland, Locke and Judson) and the English-speaking civilian, Justice Abbott, turned on reading the prescriptions of the English ideal of the Rule of Law into the statutes defining the powers of Quebec authorities. Although the Act Respecting Alcoholic Liquor which established the Liquor Commission's power to grant liquor permits did not attach any specific qualifications to the exercise of that power, the majority contended that it could only be used for purposes relevant to the general purpose of the Act and the prosecution of Jehovah's Witnesses was not one of those purposes. Justice Rand, in developing this argument, reflected on the dangers of allowing any governmental officer an unfettered discretion to use his power for any purpose or "personal" interest unrelated to the purpose of his public office.

> ...that, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. (p. 142)

The same line of reasoning also provided the rationale for the majority's rejection of Duplessis' second line of defence based on Article 88 of the Quebec Code of Procedure. This Article applied only to a public officer "in the exercise of his functions" and the majority argued that it was no part of Duplessis' functions as Attorney-General to instruct the Liquor

Commissioner to deprive Roncarelli of a liquor permit. In committing this act Duplessis, in their view, had not exercised any legally authorized power and consequently had acted as a private person.

It is significant that this emphasis on the Rule of Law as a limitation on administrative discretion was irrelevant to the approach taken to this case by the two French-Canadian members of the Court as well as to that taken by the judges in Quebec. To these judges it appeared that if Duplessis had no discretion to exercise in the field of granting liquor permits (and they concluded that he had none) it was not really relevant to consider whether or not he had abused his discretion.[1] Justice Fauteux, for example, held that the cancellation of the permit was illegal because the Commission which under the Alcoholic Liquor Act had the exclusive power to issue permits had abdicated its power to Duplessis. But Justice Fauteux, like Justice Taschereau, disagreed with the majority's contention that Duplessis had lost the protection of Article 88 because he had acted outside of his functions. In Justice Taschereau's view while Duplessis may have erred in exercising his functions what he had done was certainly among the functions he had " comme officier public

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[1] For an analysis of the case from this point of view, see comment by Claude-Armaud Sheppard, McGill Law Journal, 1959-1960.

chargé de la prévention des troubles, et gardien de la paix dans la province." (p. 130) Justice Fauteux carefully traced the legislative history of Article 88 and its judicial construction in the Quebec courts and concluded that these Quebec sources established that a public officer was not considered as ceasing to act within his functions solely because an act committed by him was an abuse of his power or excess of jurisdiction, or even a violation of a law.[1]

Clearly a conflict of political and social values was operative in the diverging paths of legal reasoning followed by the two groups of judges. The Supreme Court majority's interest in using judicial review to read Rule of Law prescriptions into the statutory powers exercised by the executive branch of government clearly was not an overriding concern of either the Quebec judges who dealt with this case or Justices' Fauteux or Taschereau. Also, the latter judges' readiness to include among Duplessis' functions his use of the Liquor Commission's discretion as an instrument for combating the Jehovah's Witnesses points to a much more tolerant attitude towards the Quebec government's campaign against that sect than that held by the Supreme Court's majority.

The final decision in this sequence of cases, Lamb v. Benoit [1959] S.C.R. 321 was provoked by the action of Quebec police against distribution of that same Jehovah's Witness tract, "Quebec's Burning Hate", as had raised the disputes

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[1] Justice Cartwright who also dissented did not consider the Article 88 issue, but held that the cancellation of the license was not an actionable wrong.

dealt with by the Court in the Boucher and Roncarelli cases and which indirectly inspired the litigation which lead to the Saumur case. This particular dispute arose when Quebec police arrested the plaintiff, Louise Lamb, a Jehovah's Witness, along with three other Witnesses for distributing pamphlets on a street corner in Verdun. The three other persons were distributing the pamphlet entitled "Quebec's Burning Hate", which, at the time, was considered to be seditious. However, there was no evidence that Miss Lamb was distributing that particular publication nor any other literature that was in any way objectionable. After being detained for the week-end she was offered her freedom by the police officer Benoit on condition that she sign a document to the effect that she would take no action against the provincial police for having detained her. She refused, was then charged with conspiring to publish the pamphlet, "Quebec's Burning Hate" and, after being freed at her preliminary hearing, brought an action for false arrest and damages against Benoit and two other officers involved in her detention.

There was no disagreement among the Supreme Court judges in dismissing the action against Benoit's two fellow officers on the grounds that they were not responsible for Miss Lamb's arrest. But the Court's six common law judges departed from all the Quebec judges who had dealt with this case and their three civilian brethren on the Court, Justices Taschereau, Fauteux and Abbott, in upholding the action against Benoit. The key point of difference between the legal

reasoning of the Supreme Court's majority and that followed by the Quebec civilian judges was whether section 24 of Quebec's Provincial Police Act which limited liability of police officers to actions instituted within six months of the alleged offence applied where the police officer had acted maliciously or not "in good faith" and without good and probable cause. This provision of the Provincial Police Act unlike that contained in the Magistrate's Privilege Act (which had been unsuccessfully invoked by the police in the Chaput case) did not explicitly state that it applied only to acts done in good faith". Nevertheless the Supreme Court majority argued that good faith was an implicit element in a police officer's actions when performing his official functions and Benoit's manifest lack of good faith, (as found by the Quebec Court of Appeal) deprived him of the protection provided for police officers by the Quebec statute.

In arriving at this conclusion the Supreme Court's common law majority showed a real concern for establishing certain norms as uniform postulates underlying public law throughout Canada - especially those areas of public law (as was the case here and in the Chaput case) which are related to the enforcement of criminal law. It was this interest which manifestly underlay the determination of both Justice Rand and Justice Locke (who wrote the principal judgments for the majority[1]) to make "good faith" a necessary

[1] On the crucial part of the judgment dealing with Benoit, Chief Justice Kerwin, Justice Cartwright and Judson concurred with Justice Rand. Justice Martland concurred with Justice Locke.

condition of an act done by an officer in his official capacity. This use of judicial review to sustain Dominion-wide enforcement of certain common law norms in the domain of public law is most evident in Justice Locke's reliance on a series of English authorities interpreting the English Public Authorities Act. Justice Locke justified this invocation of English authorities by citing Justice Kellock's judgment in the Chaput case which viewed laws governing the powers and privileges of public authorities in Quebec as being historically founded on principles of English law. To this Justice Locke added the further consideration that, since Quebec's Interpretation Act instructing judges to interpret statutes in a "fair, large and liberal" manner is modelled after the Interpretation Act of Canada and stems originally from an English-inspired statute of the pre-Confederation period, it inferentially makes English authorities relevant to the interpretation of all those Quebec statutes to which Quebec's Interpretation Act applies.

The crux of the minority's dissent was the rejection of the importation of English authorities into the interpretation of Quebec's local legislation governing the civil responsibility of police officers. The three civilian judges all insisted that the Provincial Police Act unlike the Magistrate's Privilege Act which Justice Kellock had traced to English antecedents in the Chaput case, was strictly of local Quebec origins. It had been enacted by

the Quebec Legislature in 1870 and section 24 was clearly designed to qualify Article 1053 of Quebec's Civil Code so as to reduce the time limit within which actions for damages against police officers could be taken from the normal two years to six months. Thus in their view "des précedents du common law" to quote Justice Taschereau, "...n'ont aucune application, et ne peuvent nous aider à la solution de ce litige."(p.339) They concluded that since the action had been initiated after six months had elapsed and the question of "good faith" was irrelevant to deciding whether Benoit was protected by the Act, the action against Benoit should be dismissed.

We have analyzed this series of cases in considerable detail because this is the one group of decisions in which our quantitative analysis pointed to the persistence of a bi-cultural cleavage of opinion among the Supreme Court's judges as well as between the Supreme Court's majority and the majority of judges in Quebec. Our analysis of the issues involved in these cases and the different judges' treatment of them certainly has indicated that the Supreme Court's reversal of the Quebec Court of Appeals in all of these cases and the marked tendency of the Court's French-Canadian members to dissent from the majority's judgments are not coincidences, but are the outcome of a basic clash of social and legal values. The line of cleavage was most clearly marked in the cases involving the Jehovah's Witnesses. It

was only in these cases (all but Chaput) that all of the French-speaking Quebec members of the Supreme Court dissented from the majority's reversal of the Quebec Court of Queen's bench. In these Jehovah's Witness cases, the Supreme Court's non-Quebec majority showed an ideological hostility to the programme of legislative and executive action pursued by the Duplessis administration in Quebec against the Jehovah's Witnesses. The Quebec judges displayed a considerable sympathy for the "necessity" of that programme and for the legal capacity of the Province to carry it out. On the larger Constitutional question raised by some of these cases concerning the scope of Provincial power under the B.N.A. Act to curtail fundamental freedoms, the Supreme Court came close to establishing a consensus among its own members at least on the point that a province could not enact criminal law as a means of controlling speech or compelling a pattern of worship. Although in going this far, it diverged from the Quebec Courts which viewed the legislation challenged in the Saumur, Birks and Switzman cases as unexceptional exercises of established provincial powers.

Our analyses of these cases - quantitative and qualitative - up to a point supports the conclusion reached by Professor Edward McWhinney with regard to this area of the Supreme Court's activity. Professor McWhinney concluded his review of the Court's decisions in the Jehovah's Witness cases with the following remarks:

> ...The Supreme Court of Canada, by majority vote (with the judges tending to line up somewhat according to

> their own ethnic cultural affiliations) has preferred "Open Society" values, and has come down clearly on the side of the interests in speech and religion as advanced by the Jehovah's Witnesses. Insofar as these "Open Society" values accord essentially with the attitudes of the English-speaking majority of Canada, the Supreme Court of Canada has preferred national values over provincial values....[1]

Certainly it is evident that the Supreme Court's majority, through its decision-making in these cases, upset the Quebec government's preference for social order over freedom of speech and worship for sects which propounded a creed thoroughly abusive to the faith of the majority of the Province's inhibitants. But in doing so did it impose the standards of English-speaking Canada on those of French-speaking Canada?

It would be reasonable to answer this question in the affirmative if we took the Duplessis administration's attack on the Jehovah's Witnesses and the bitter reaction which that sect's explosive tract, "Quebec's Burning Hate", undoubtedly provoked among Quebec's Catholics as representing the fixed and homogeneous position of the major part of Quebec's population towards civil liberties. But such an assumption would surely be untenable. There is ample evidence to suggest that there were many in Quebec who opposed the Duplessis government's willingness to use the

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[1] Edward McWhinney, Comparative Federalism, (University of Toronto Press, 1962) p. 77. See also his "Federalism, Pluralism and State Responsibility - Canadian and American Analogies" 34 New York Law Review (1959) 1079.

power of the state to limit the activity of unpopular religious or political groups. Further, the rapid changes which have taken place in Quebec society and politics have undoubtedly reduced the pervasiveness of traditional Catholic attitudes and have stimulated the development of more secular, liberal conceptions of individual rights and freedoms. In part, at least, the interests and aspirations generated by these changes in Quebec society found their policital expression in the collapse of the Duplessis regime and the election in 1960 of a Liberal administration headed by Premier Lesage. The contrast between this government's approach to civil liberties and that adopted by earlier Quebec governments was revealed soon after it came to power. At the Dominion-Provincial Conference of July, 1960 Premier Lesage came out strongly for a Bill of Rights incorporated in the Constitution and binding on the provinces. He referred to the need for such a Bill with the following words:

> ... L'expérience des dernières années a convaineu le gouvernement du Québec que les droits de l'homme n'étaient pas suffisamment protégés sur le plan de la juridiction provinciale. Nous croyons donc qu'il est maintenant nécessaire pour d'avoir un Bill des Droits de l'homme. Nous sommes aussis d'avis qu'un tel bill aurait une bien plus grande valeur réelle et symbolique s'il faisait partie de notre constitution.[1]

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[1] Report of Proceedings, Dominion-Provincial Conference, 1960 (Queen's Printer, 1960) p. 28.

As is well known the goal of a Constitutional Bill of Rights has not yet been realized, but this can certainly not be attributed to a bicultural division of opinion.

Looked at from the more dynamic point of view the Court's majority rather than being considered to have simply vetoed the policies of Quebec's majority might be said to have acted as a judicial vanguard for significant forces which were beginning to agitate Quebec society and which, during the 1950's, were in the process of becoming the predominant element in the Province's political life. If this interpretation of the Court's role is correct, then we may have here a peculiar illustration of the cultural time-lag which in a dynamic society may come to separate the outlook and opinions of judges who are appointed for life from the attitudes of leaders of popularly elected governments.[1]

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[1] For a persuasive analysis of this time-lag in relation to the United States Supreme Court, see Fred Rodell, Nine Men, (Random House; Vintage Books, 1964).

In this case the tension has been between a popular movement on the provincial level towards more liberal-democratic and secular values and Quebec judges (both in the provincial judiciary and the Supreme Court) appointed by a federal authority less responsive to these modifications of effective political opinion in Quebec.[1] The Supreme Court judges appointed from English-speaking Canada have on the other hand, come from a society in which the "Open Society" freedoms have had the allegiance of the main stream of opinion

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[1] See Chapter III, Section 1 (vi) for our analysis of the extent to which the existing system of appointments favours the appointment of politicians or provincial jurists who have ties with the provincial wing of the federal political party in power. This orientation in the appointing process has mitigated against the possibility of appointing Quebeckers who might represent new or radical political and social developments in Quebec.

both within and without the legal establishment for a much longer period of time and hence have had more in common with the newer forces in Quebec society at least insofar as those forces have carried with them a broader concern for individual and minority rights and a greater tolearnce for the propagation of anti-Catholic religious sentiments.

This dynamic analysis suggests that it is a misleading over-simplification to conclude from this series of Quebec civil liberties decisions that the Supreme Court has imposed the values of the national majority on the provincial majority in Quebec. No doubt our view here depends very much on assumptions about certain changes occurring in the governing value premises of Quebec society. Our substantiation of these assumptions would take us far beyond the scope of this work. Suffice it to say that with regard to those cultural values related to balancing the desire for social order against the interest in securing the rights of individuals to propagate unpopular religious and political doctrines we accept the view recently expressed by D. Kravnick that, "Today... the particular outlook, orientation, and value system which differentiated French Canada are in the process of rapid disintegration."[1] We think some further evidence is provided for this view by the fact that the Supreme

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[1] D. Kravnick, "The Roots of French-Canadian Discontent." 31 Canadian Journal of Economics and Political Science (1965) 509, at pp. 522-3.

Court's judicial veto of the Quebec governments attempts to limit freedom of speech and worship was not resisted by a widespread popular reaction in Quebec.

But we should also notice that the flow of influence in these decisions has not been entirely one way from the national Court to the provincial culture. Quebec's representatives have clearly influenced the position taken by the Court in these vital questions of civil liberties. The most significant influence they have had is on the basic issue of the position of civil liberties under the B.N.A. Act. Here, as we have pointed out, they were an indispensable element in that judicial alliance which gave Supreme Court authorization for classifying restraints on civil liberties which employ criminal sanctions as Criminal Law beyond provincial jurisdiction instead of the Duff-Rand approach which would assign an autonomous value to legislation curtailing fundamental communicative freedoms and on the basis of an implied Bill of Rights in the preamble to the B.N.A. Act put such legislation beyond the reach of the provinces and possibly of the national legislature too. In this sense the French-speaking Quebec justices have acted more as one of the minorities rather than <u>the</u> minority on the Court's bench. In this area of constitutional law relating to civil liberties as well as other areas of decision-making what Robert Dahl has said of the United States Supreme Court would seem applicable to its Canadian counterpart:

> Few of the Court's policy decisions can be interpreted sensibly in terms of a "majority" versus a "minority". In this respect the Court is no different from the rest of the political leadership. Generally speaking, policy at the national level is outcome of conflict, bargaining, and agreement among minorities; the process is neither minority rule nor majority rule but what might better be called minorities rules.[1]

And similarly the fact that the final consensus which did emerge on the Court accepted the Criminal Law approach rather than the more activist and, in civil-libertarian terms, more radical, implied Bill of Rights doctrine, would appear to lend support for the application to Canada of Dahl's thesis that "... The Supreme Court is inevitably a part of the dominant national alliance."[2]

5. Other Potential Bicultural Issues

In this chapter of our study we have been reporting our examination of the leading decisions of the Supreme Court in those areas of its work in which the cultural background of the judges - in particular the French or English-Canadian aspect of their backgrounds-might be considered to have been a possible cause of diverging opinions among the judges. In the three preceding sections of this

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[1] "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker". 6 Journal of Public Law (1958) 279, at p. 294.

[2] Same, 293.

chapter we have seen some evidence of such cleavages of opinion, most notably in the connection with civil liberties in Quebec and, in the family relations cases, at least in the Donaldson case. However, we have also seen that it is a gross over-simplification to refer to these clashes of social values and outlooks in simple bicultural terms as French-Canadian versus English-Canadian conflicts. Even where the dichotomy between the political and social philosophies of the judges is most evident, as for instance between Justices Taschereau and Rand in the Saumur and Switzman cases, while it is surely clear that the views of both judges have been conditioned by traditions and ideas which have wide currency in the particular sections of Canada from which they come, it is equally clear that these particular ideas and traditions do not represent homogeneous French-Canadian or English-Canadian cultures. Whether they represent the prevailing trend of opinion within the two cultures must remain a matter of dispute. But, at the very least, we have insisted that with regard to the social values expressed by the French-Canadian jurists, they represent a phase - a traditional, largely Catholic phase - of French-Canadian society which, however much it may have predominated in the past is now seriously challenged by a more secular, liberal outlook.

Now in this final section of Chapter V we simply wish to sum up our study of leading cases in those areas of potential bicultural conflict not dealt with in sections 2 to 4. This takes in a wide range of issues and includes the various

issues and cases identified in Question II of our quantitative questionnaire. Thus it includes cases which raise questions relating to religion, obscenity, education, racial discrimination, the due process of law in the administration of law and the review of decisions made by administration tribunals, civil liberties outside the context of Quebec society and the division of powers in Canadian federalism. Our study of the Court's divisions in these cases and of its differences with provincial appeal courts has, with a few slight exceptions, indicated that these differences are not significantly or consistently the outcome of a bicultural difference of opinion. Thus our qualitative analysis of leading decisions bears out the general outcome of our quantitative study - that it is only in those decisions concerning civil liberties in Quebec that a "bicultural factor" has been a significant determinant of the Court's decision-making.

We do not feel that it would be worthwhile to set out here all the evidence for this negative finding. What we will do is look at the cases which, to some extent, appear to be exceptional and make some attempt to summarize the general way in which the Court has divided in these areas of "potential bicultural" cleavage.

Decisions concerning the application of the Lord's Day Act might be thought to create situations in which the religious aspect of the judges' cultural background would affect their approach to the case. However, a number of recent cases which have concerned legislation compelling

observance of Sunday as a day of rest provide no clear evidence that religious convictions related to a determinate cultural background or denomination have affected the division of opinion among the judges in the treatment of this issue. In two cases the Supreme Court was divided as to whether a particular activity taking place on Sundays was in violation of Section 4 of the federal Lord's Day Act which, with certain qualifications, proscribes the conduct of business on Sunday. In Canadian Broadcasting Corporation v. A.-G. Ont. [1959] S.C.R. 158, the majority consisting of three Protestants, Justices Rand, Locke and Cartwright, and one French-Canadian Catholic, Justice Fauteux, held that the Lord's Day Act did not apply to the C.B.C., while Justice Taschereau, a French Canadian Catholic, was supported in dissent by two English-speaking Protestants, Justices Abbott and Judson. Again in Gordon v. The Queen it was an alliance of Protestants and Catholics (Justices Taschereau, Fauteux, Abbott, Martland, Judson, Ritchie and Chief Justice Kerwin) which found the operation of an automatic laundry on Sunday in violation of Section 4 of the Lord's Day Act. Justice Cartwright dissented on the grounds that neither the owner nor his employees were required to work in order to operate the laundromat on a Sunday.

In neither case did the reasoning of the judges reveal any deep-seated feelings about the importance, from the point of view of religion, of keeping Sunday as a day of

rest. Indeed the strongest explicit expression of interest in maintaining conditions which would foster Christian worship came in Justice Locke's judgment where in arguing against the application of the Lord's Day Act to the C.B.C. he advanced the consideration that if the C.B.C. was prevented by the Lord's Day Act from operating on Sunday this would prevent the broadcasting of church services and religious music for the benefit of the sick and the disabled, a service which he was sure was "regarded as of inestimable benefit by great numbers of Canadian people. (p.203)" Also the Court's decision in the recent case of Winnipeg Film Society v. Webster [1964] S.C.R. 280 indicates the absence of religious sources of division among the judges on the question of Sunday observance. Here the Court, consisting of two Roman Catholics, Justices Fauteux and Hall and three Protestants, Justices Martland, Ritchie and Cartwright unanimously held that the private, non-profit film club did not violate the Lord's Day Act by showing films on Sundays.

A fourth case Robertson and Rosetanni v. The Queen [1963] S.C.R. 651 provides a much more significant test of the judges' attitude to compulsory Sunday observance, although hardly a test which is relevant to the particular Christian denomination to which the judges belong. The issue in this case was whether the Lord's Day Act conflicted with the Canadian Bill of Rights which requires that every Act of Parliament be so "construed and applied" as not to abrogate

any of the rights and freedoms specified in the Act, one of which is "freedom of religion". The majority, consisting of Justices Fauteux, Taschereau, Abbott and Ritchie, decided that the Lord's Day Act was not rendered inoperative by the Bill of Rights. But more important than the mere outcome of the case is the position taken by Justice Ritchie who wrote the majority's judgment on the two key issues in the case - the general import of the Bill of Rights and the meaning of freedom of religion. On the first question Justice Ritchie's judgment committed the Court, in this its first reasoned decision on the Bill,[1] to a view which went even further than some of the lower courts' interpretations towards depriving the Bill of any real affect on statutes passed prior to the enactment of the Bill of Rights. Justice Ritchie reasoned that the rights and freedoms protected by the Bill were those which existed at the time the Bill was passed and hence were rights and freedoms as limited by the laws (including Lord's Day observance legislation) which existed at the time the Bill was enacted. Secondly, on the question of freedom of religion, Justice Ritchie took the rather narrow view that this freedom is only infringed by legislation which has the effect of preventing people from practising their religion and not by legislation which simply imposes a

[1] In two earlier cases the Supreme Court had dismissed attempts to apply the Bill of Rights to acts of Immigration officials, but advanced no extensive reasons. Louie Yuet Sun v. The Queen [1961] S.C.R. 70 and Rebrin v. Bird [1961] S.C.R. 376.

commercial or "business inconvenience" on all so that the followers of one religious tradition can have Sunday observed by ... according to the tenets of their particular religion. Justice Cartwright, the sole dissenter, was diametrically opposed to the majority on both these points. He was prepared to give full effect to the Bill of Rights where another Act of Parliament was in conflict with its terms. And on the scope of freedom of religion he expressed the opinion that "... a law which compels a course of conduct whether positive or negative, for a purely religious purpose infringes the freedom of religion. (p. 660)".

What stands out in the Court's decision in Robertson and Rosetanni far more than any possible reflection of the judges' particular religious sentiments is the rather pedestrian and legalistic character of the Court's treatment of what might be regarded as issues of vital importance to Canadian society. The Court's evaluation of the Bill of Rights as an important guarantee of fundamental rights and freedoms is reflected in the fact that only five judges sat for the case instead of the usual seven- or nine-judge courts which hear about 70% of all constitutional cases.[1] Also the majority's sources in working out the significance of freedom of religion as a fundamental human right were confined to some rather scanty references to the subject in earlier Canadian judgments, a "self-imposed horizon of reference" which as Bora Laskin has suggested "is not calculated to inspire

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[1] See Table 1c, above, p. 171.

much confidence in the depth analysis of the issues confronting the court."[1] The alliance of the two civilian and two common law judges in this case suggests that underlying any differences which might stem from their differing legal or cultural backgrounds is a common judicial style in the treatment of large public law issues which eschews the self-conscious and reflective role of judicial policy-making for a more positivistic posture.

Another issue on which the relgious attachments of judges might be thought to have influenced their judgment is the question of obscenity. Certainly there were many suggestions in the press following the Supreme Court's decision on the question of obscenity in Lady Chatterley's Lover that the division of opinion on the Court was largely the result of Protestant versus Catholic moral outlooks. The decision came in Brodie, Dansky and Rubin v. the Queen, [1962] S.C.R. 681, a Quebec appeal in which the Supreme Court's majority reversed the Quebec Court of Queen's Bench and by a five-to-four decision ruled that Lawrence's novel was not obscene. Bruce Macdonald's analysis of the judicial alignment in the Toronto Globe and Mail was typical of many other newspaper accounts of the judgment:

> The majority ruling of the high court was supported by Justices Cartwright, Abbott, Martland, Ritchie and Judson. The first four list themselves in the Parliamentary Guide as Anglicans, while Mr. Justice Judson gives no religious denomination.

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[1] "Freedom of Religion and The Lord's Day Act - The Canadian Bill of Rights and The Sunday Bowling Case" 42 Canadian Bar Review (1964) 147, at 152.

> Those dissenting were Chief Justice Kerwin and Justices Fauteux, Taschereau and Locke. With the exception of Mr. Justice Locke, an Anglican, the dissenting judges are Roman Catholics.[1]

No doubt the difference of opinion between the majority and the minority in this case was conditioned by different moral evaluations of Lady Chatterley's Lover. All the judges accepted the "undue exploitation of sex" as stated in the recently enacted Section 150(8) of the Criminal Code as a sufficient, if not necessary, test of obscenity. But they differed in their applications of this test - and this difference clearly reflects different degrees of moral shock experienced by the judges in reading the novel. But is this difference in moral judgments necessarily the result of the different Christian dominations to which the judges belong? Surely this is questionable. After all, moral indignation about the "exploitation" of sex in Lady Chatterley's Lover has not been confined to Catholic circles.

A more recent judgment of the Court dealing with obscenity casts further doubt on the inference implicit in popular interpretations of the Brodie case that the Catholic judge is more apt than the Protestant judge to consider literature obscene. In Dominion News & Gift (1962) Ltd. v. the Queen [1964] S.C.R. 251, Chief Justice Taschereau writing the opinion for a unanimous Court including five Protestants, Justices Cartwright, Martland, Judson, Ritchie,

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[1] The Globe and Mail, Friday, March 16, 1962, p. 8.

and Spence, and one Catholic, Justice Hall, reversed the Protestant majority of the Manitoba Court of Appeal and ruled that issues of "Escapade" and "Dude" Magazines held to be obscene by the lower courts were not obscene. In his judgment Chief Justice Taschereau simply accepted the reasons given by the dissenting member of the Manitoba Appeal Court, Justice Freedman. But it should be noted that Justice Freedman's dissenting judgment represents one of the most liberal, as well as one of the most thoughtful, examinations of the question of obscenity under Canadian law. In applying the test of "undue exploitation of sex" Justice Freedman warned that, "In this area of the law one must be especially vigilant against erecting personal tastes or prejudices into legal principles."[1] He suggested that the judge should search for a common Canadian standard and if he did so he would have to take into account the general changes which have taken place in Canadian social mores since the Victorian period so that nowadays, for most people, "sex is a topic of parlour conversation."

As with the Court's decisions in the Lord's Day Act cases, so here with the cases dealing with obscenity one is struck much more by the general style of jurisprudence adopted by the judges in settling disputes which establish principles of great importance to the public law of the

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[1] 1963, 42 W.W.R. 65, at p. 79.

country than by any differences which the French Catholic or English-Protestant backgrounds of the judges may generate in the judges' determination of the issues. In the Brodie case at least the Court saw fit to sit as a plenum to deal with the question of obscenity. But there was almost a total lack of any collegiality in the Court's resolution of the important legal questions involved, with the result that these questions were not definitively resolved. Nine judges produced seven judgments and as one of the leading authorities on this area of Canadian law, D.A. Schmeiser remarked "... there ought to be a law against that. It does not seem unreasonable to expect a Court with so many judges to consolidate its views before each judge begins to write."[1] On the important question of law - whether the definition of obscenity in Section 150 (8) of the Criminal Code is exclusive or whether the so-called Hicklin text based on English authorities is still part of Canadian law - four judges ruled that it was exclusive, two that it was not, and three did not commit themselves on the issue. Again the judges demonstrated a general reluctance to indulge in a wide-ranging exploration of the legal and sociological implications of the law relating to obscenity. In the Dominion News & Gift case, following Chief Justice Taschereau, they were willing to leave that kind of self-conscious judicial policy -making to Justice Freedman of the Provincial Appeal

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[1] Civil Liberties in Canada, p. 246.

Court.

In leading decisions in the other possible areas of bicultural conflict we did not, as we reported above, find that the Quebec or French-speaking members of the Court played a distinctive role. Certainly in the important cases appertaining to the division of powers in the B.N.A. Act, they supported the predominant tendency on the Court. In Johannesson v. West St. Paul, which of all the Supreme Court's Constitutional decisions since the abolition of appeals, has been the one which potentially has the most expansive effect on the central government's powers,[1] they supported the Court's unanimous judgment. On the other hand in a series of rather recent constitutional decisions which in effect developed new areas in which provincial legislation could operate concurrently with federal legislation, they were again part of a large coalition with which only Justice Cartwright consistently disagreed.[2]

In some of the important cases raising civil liberties in a general Canadian setting, the French-Canadian judges aligned themselves with the more conservative side of the Court. For instance in Oil, Chemical and Atomic Workers v. Imperial Oil [1963] S.C.R. 584, Justices Taschereau

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[1]For a discussion of this and other constitutional decisions since 1949 see Peter H. Russell, above, page 121, footnote 4.

[2]See above, p. 371.

and Fauteux together with Justices Martland and Ritchie upheld, as constitutionally valid, British Columbia's legislation designed to prevent Unions from giving any financial support to a political party. And again, in Williams v. Aristocratic Restaurants Limited [1951] S.C.R. 762, Chief Justice Rinfret joined Justice Locke in dissenting from Justice Rand's majority finding that peaceful picketing was a legitimate exercise of free speech. But here as in other cases the French-Canadian jurists were allied with English-speaking jurists and it was the latter who wrote the leading judgment for their side of the case.

Thus outside of those cases involving challenges to the Quebec government's policy of curtailing freedom of religion and speech, it is a fair summary of our findings to conclude that bicultural factors do not appear to have played a decisive role in the Court's decision-making. On the whole the Court's decision-making in most of the controversial areas of public law has either been so lacking in any degree of collegiality that it is impossible to detect any meaningful alliances among the judges or else, where alliances have been fairly well demarcated, they have included both French-speaking and English-speaking members of the Court. And, as for the general style or philosophy of jurisprudence, the Quebec members of the Court have shown that they are content to accept the traditional positivist approach which, with the exception of some notable

flourishes (especially by Justice Rand) in the direction of "judicial statesmanship", has been adopted by most of their common law brethren.

As a closing note to this chapter we should acknowledge that one body of decisions which we did not single out for detailed analysis is that groups of Quebec appeals dealing with Quebec's Civil Code or other phases of that Province's distinctive legal system. To the Quebec jurist this is likely the area of the Supreme Court's decision-making in which he anticipates the most serious instances of bicultural cleavage between the Supreme Court's civilian and common law judges and, even more, between the Supreme Court as a whole and Quebec's highest court of last resort. Our omission from this chapter of cases dealing with important questions relating to Quebec's civil law does not mean that we do not regard such cases as an important source of the cultural differences in the Supreme Court's work, but rather it stems as we have stated before, from the limitations of our own time and skills. To explore this area thoroughly and sensitively would require a separate study carried out by professional lawyers well versed in both legal traditions. Our main contribution to this phase of biculturalism in the Supreme Court's decision-making has been by way of our quantitative study.

However, in this chapter, while looking at leading cases relating to civil liberties and family relations, we

explored some of the most publicized cases in which a "common law" majority of the Supreme Court overruled the civilian minority as well as the Quebec Appeal Court on a question which was concerned, inter alia, with a provision of Quebec's Civil Code or Code of Procedure. The three cases in which this occurred were Taillon v. Donaldson, dealing with the custody of children and the Roncarelli and Lamb cases in which civil actions were brought against Quebec public officers. Without going into the question of whether the common law judges' decision was "alien" to the spirit and substance of Quebec's civil law in these cases, the one aspect of these decisions which is clear is that the division of opinion involved more than a mere conflict in the interpretation of legal rules. In each case the interpretation of the Quebec law favoured by the civilian judges carried with it either positively or negatively a moral or political outlook not shared by the Supreme Court majority -- in the Taillon case, the natural law conception of the sanctity of the family and in the Roncarelli and Lamb cases, at least a rejection of the Rule of Law norms as implicit conditions attached to the exercise of public power in Quebec. This suggests that Quebec's civil law as interpreted by the majority of Quebec civilian jurists can serve, as has so often been claimed, as a reservoir of distinctive cultural values - values which may not be shared and may even be rejected by the majority of judges on the Supreme Court of Canada. Of

course, whether those values are in keeping with the main trends of opinion and culture in French Canada is another question as is the question of whether, if these values showed up in the civil law by its professional custodians, are out of step with Quebec society, they are best adjusted to changing conditions by the Supreme Court of Canada or by legislative and political agencies in Quebec.

Conclusions

In each section of our study we have stated the basic outcome of our inquiry into bilingual and bicultural aspects of the Supreme Court. In particular in Chapters III to V we have summed up our findings at various points on the main issues of bilingual or bicultural concern pertaining to the Court's personnel, procedures and its decision-making, focussing throughout on the post-1949 period. Here we wish to draw together the various strands of our study in order to see what implications our findings have for the central concerns which Canadians have had about the Court.

The easiest place to begin is with bilingualism in the Court. Here the evidence is clear that by any reasonable measure of bilingualism, the Court has failed. Although following Section 133 of the B.N.A. Act French, *de jure*, has equal status with English as an official language of the Court, *defacto*, the operating conditions in the Court are such that French-speaking people are under a strong inducement to use English when appearing before it. Nor in communicating its judgments to the larger public outside the Court, has it systematically and thoroughly endeavoured to make its Reports as accessible to French-speaking Canadians as they are to English-speaking Canadians. The Court in

both its personnel and its procedures is still today primarily an English-speaking institution.

While there can be no doubt about the Supreme Court's failure to achieve a reasonable degree of bilingualism, it is also clear that this failure up until now has generated relatively little discontent, even among Quebec lawyers and jurists. This relative lack of discontent reflects the extent to which both the French-speaking jurists and counsel who have worked in the Court have been assimilated into the English-speaking culture. But, given the current mood of French-speaking Quebeckers, especially those who belong to the middle and professional classes it would seem doubtful that French-speaking lawyers will in the future continue to be assimilated on the same scale or acquiesce so readily in a final court of appeal which functions primarily as an English-speaking institution. Already, as our poll of French-speaking Quebec lawyers revealed, even among French-speaking Supreme Court counsel who are fluent in English, there are a significant number who object on the basis of principle rather than inconvenience to a situation which they feel makes it incumbent on them to plead their cases in English if they are to maximize their client's chances of winning. But even if there was not the likelihood that the Court's English-speaking character would in the future seriously erode the acquiescence of French-speaking Canadians in the Supreme Court as their last court of appeal, one might still argue that to fail to take immediate steps to strengthen

the Court's bilingual capacities would be to miss an opportunity to develop the Supreme Court as one of those national institutions which is equally meaningful and responsive to both English-speaking and French-speaking Canadians.

In Chapter III we canvassed a broad range of possible reforms relating to the Court's personnel,[1] the various stages in its decision-making procedure[2] and the publication of its decisions.[3] In support of the specific reasons advanced for these reforms we would like to add two general considerations. First, as we pointed out in examining a number of these reforms, some of the changes designed to increase the Court's bilingual qualities might promote general improvements in the Court's effectiveness to act as the nation's highest tribunal for the resolution of issues of fundamental importance to the country's public law. For instance, the greater reliance on written materials rather than oral arguments, the use of bilingual law-clerks, the development of more systematic conference procedures and the expansion of the time and effort devoted to researching the policy and legal implications of important cases, all of which would make it easier for the Court to handle cases in both languages, would also enhance the Court's ability to conduct its business in a way which would be more congenial to

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[1] See above, pp. 192-5; 197-99, 207 & 219.

[2] See above, pp. 206-210; 216-225 & 227-231 & 271-277.

[3] See above pp. 241-245 & 271-277.

the advocates of "judicial statesmanship".[1] This is an important point for it must be borne in mind when considering any reform proposed to serve the interests of bilingualism or biculturalism that the Supreme Court has other purposes to serve, other norms to satisfy. When, however, it can be shown that such proposals not only are consistent with but positively enhance other improvements desired by a significance segment of the Court's professional critics, this should certainly increase their attractiveness.

A second general point we would make in support of the desirability of implementing reforms of the Court is that, even if some of the more extreme proposals for reducing the control of English-speaking, common law members of the Supreme Court over Quebec's civil law were adopted, the need for a bilingual national court to deal with matters which are clearly of national importance would remain. The two approaches to reform of the Supreme Court which have been most widely considered by the Court's civilian critics in Quebec are the termination of all appeals to the Supreme Court from Quebec's highest court of last resort in matters pertaining to Quebec's local law or the establishment on either a permanent or ad hoc basis of a specialized chamber of the Court in which civilian jurists would be guaranteed a controlling

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[1] See above, Chapter II, section 3.

influence in the disposition of Quebec appeals concerning that province's civil law. But the proponents of both these approaches have assumed that if their respective schemes were carried into effect there would still be a need for a federal appellate court manned by jurists from both English-speaking and French-speaking Canada to adjudicate questions of national significance. If the services of such a national tribunal either with its existing jurisdiction or with its jurisdiction confined to matters of national import are to be shared on an equal basis by both French-speaking and English-speaking Canadians, changes must be made in either the Supreme Court's personnel or its method of conducting its business or both which will make it as convenient for French-speaking Canadians to use their native language in the Court as it is for English-speaking Canadians to plead their cases in English.

Now turning to the bicultural as distinguished from the bilingual aspects of the Court it is more difficult to derive clear-cut conclusions from our findings. This no doubt is to be expected. It is difficult to work out a concept of "biculturalism" which as either a political value or a sociological concept can be used effectively and unambiguously in any field of inquiry. Further, in our own study, we have argued against an oversimplified use of biculturalism as a category of explanation. We have seen that it may be very misleading in substantive legal issues to

assume that there are typical French or English, civil law or common law, points of view. Also in analyzing differences of opinion between French and English-speaking jurists we have questioned the validity of attempts to account for these differences simply by referring to the French and English, or Catholic and Protestant aspects of the judges' backgrounds.

Nevertheless we did, for purposes of analysis, identify two areas of "bicultural concern" as directives for our empirical research.[1] The first of these was the common law - civil law dualism in the Supreme Court's jurisdiction. In our historical chapter we traced the civilian jurists' fear that the Supreme Court's common law majority would adulterate Quebec's civil law by grafting on to it common law techniques and precepts. This has undoubtedly been the most persistent source of Quebec discontent with the Supreme Court. Although, since the abolition of Privy Council appeals in 1949, at the political level, it has been a less prominent grievance than the federalist complaint against the central government's control of the tribunal which umpires the federal division of powers. But recently there has been a revivial of the classical civilian protest against the Supreme Court's inadequacies and dangers as a final court of appeal for Quebec's

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[1] See above, pp. 136-143.

civil law.[1] This protest is likely to be intensified in the future as the tempo of Quebec nationalism accelerates. For as we stressed in our historical analysis the fundamental basis of this protest is not a mere concern for legal purity and accuracy but a nationalist conviction that Quebec's civil-law system is an essential ingredient of its distinctive culture and as such requires for its survival judicial custodians imbued with the methods of interpretation and social values integral to that culture.[2]

In our detailed examination of the Court's decision-making since 1949 we did not try to gather evidence with which to test the civilian complaint regarding the Supreme Court's tendency to transmit alien norms and techniques of construction into Quebec's civil law system, nor indeed did we systematically examine those cases which might throw some light on the contention that the Supreme Court has erred in interpreting Quebec's Civil Code. Quebec jurists have already produced a great deal of careful scholarship in

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[1] A recent statement of this viewpoint is provided by Dean Azard of the University of Ottawa's Law School, "La Cour Supreme Du Canada et L'Application du Droit Civil De La Province De Québec," 43 Canadian Bar Review (1965) 545.

[2] For an interesting illustration of the way in which civilian members of the Supreme Court may transmit English legal precepts into Quebec's Civil Code, see René H. Mankiewicz, "La Fiducie Québecoise et le Trust de Common Law." 12 Revue de Barreau (1952) 16.

support of these contentions[1], and we considered it beyond our own terms of reference to undertake a substantive study of this question. But we would also contend that, to the extent that the civilian complaint is based on a sense of nationalism, research into individual cases is irrelevant. To those who look upon the judicial interpretation of Quebec's civil law as a quasi-legislative activity capable of making a vital impact on the texture of French-Canadian society the mere possibility that this activity might be controlled by judges appointed from other parts of Canada, untrained in Quebec's legal system, is sufficient grounds for condemning the existing jurisdiction and organization of the Supreme Court.

Our quantitative study did throw some light on the extent of potential "common law" influence on Quebec's civil law. Our analysis of the work-load produced by the rules governing the Court's jurisdiction showed that cases concerning private law account for the great bulk of the Court's business. This means that

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[1] We have discussed some of this scholarship above in section 4(11) of Chapter I. Note also should be made of the extensive study which Professor Paul A. Crépeau of McGill University has been carrying out on the impact of Privy Council and Supreme Court decisions on those parts of Quebec's civil law relating to civil responsibility.

an overwhelming proportion of the cases which come to the Court from Quebec are essentially confined to questions related to Quebec's civil law. In our examination of the Court's disposition of provincial appeals we found that the Court was only slightly less likely to reverse Quebec's highest appellate court in appeals involving provincial law matters than the appellate courts of the other provinces. Further, in tracing the balance of power between civilian and common law judges in Quebec appeals, we saw that whereas up to 1949, the Quebec judges were of necessity always in a minority position, after 1949, with the addition of a third Quebec judge, they constituted a majority in most Quebec appeals. Still it was evident that in a significant fraction of Quebec appeals since 1949, including some confined to the interpretation of Quebec's Civil Code, common law judges constituted a majority or wrote the Court's judgment. We also noted that in these cases there was clearly a greater tendency for the Supreme Court to reverse the Quebec appellate court. Finally in our analysis of voting patterns in Civil Code cases, while we found that the three civilian judges on the whole formed a dominant coalition, we also identified a tendency in a number of controversial cases for a coalition of common law judges who were relatively infrequent participants in Quebec appeals to tilt the balance of power away from the civilian judges.

In our qualitative study of leading decisions we did see, in a number of instances, how differing approaches to Quebec's civil law by civilian and common law judges can entail the

application of different moral or political values to the interests involved in the dispute. This is particularly evident in the Roncarelli, Lamb and, to some extent, the Chaput cases where the common law majority, citing English authorities, read Rule of Law precepts into the statutory powers and civil responsibilities of Quebec public authorities. When one is asked to consider the merits of altering the Supreme Court's structure so that only civilian jurists could determine the outcome of appeals involving Quebec's civil law, it is worth remembering that under such a system it is highly unlikely that these three cases and others like them would be heard by a full Supreme Court. Whether or not one is dismayed or attracted by this prospect will depend on whether one gives a higher priority to Quebec's opportunity for self-determination in areas of law which are thought to be integral to its own culture or whether one wishes to see the common law judges' Rule of Law idealism applied to all of Canada. But this raises the further question of whether it would be better to settle such issues, as the application of Rule of Law precepts to the administrative process and the definition of basic civil liberties, within the context of the local cultures of Canada's different regions or as part of Canada's national political culture.

This brings us to the other dimension of bicultural concern which we have studied - the general tension or conflict in the Supreme Court's decision-making between values

associated with French-speaking Canada and those associated with English-speaking Canada. Here the principal outcome of our quantitative study, was to confirm that the one type of case in which there was a marked tendency for the Quebec jurists both on the Supreme Court and the Quebec Court of Queen's Bench to dissent from the position taken by the Supreme Court's English-speaking majority was that which involved attempts by the Quebec government of Premier Duplessis to curtail the freedom of religion and freedom of speech of unpopular religious and political minorities. However, in interpreting the results of our detailed analysis of these cases in Chapter V, we argued that, while the Supreme Court had undoubtedly vetoed policies which at the time were favoured by the most influential political forces in Quebec, it had also acted as the vanguard for those elements in Quebec society which were moving closer to the predominant English Canadian attitudes to civil liberties and which were in the process of challenging the more traditional forces for the leadership of Quebec opinion. We also suggested that the presence of civilian judges on the Supreme Court had the effect of shifting the position of the Court's effective majority on civil libertarian questions to a moderate position reasonably acceptable to the main components of the governing national alliance.

Although it is perhaps beyond the formal terms of reference of this study to express opinions on the merits of possible suggestions for reforming the Court, we cannot resist

the opportunity of at least indicating the direction in which our research would prompt us to turn if we were asked to consider basic structural reform of the Supreme Court. Of the two alternative reforms which have most frequently been put forward by the Court's Quebec critics, - the termination of appeals in provincial law matters or the establishment of a specialized civil law chamber (matched presumably by a specialized common law chamber) - we would definitely prefer the former. We would prefer it not only because such a reform would effectively meet the aspirations of the Court's staunchest opponents in Quebec but because, if applied to all the other provinces, it would, in our opinion, lead to a much more rational organization of the nation's judicial business and a much more effective and useful Supreme Court.

In short we would advocate the federalist reform[1] of the Supreme Court's jurisdiction which would make the provincial appeal courts the final courts of appeal in provincial law matters leaving the Supreme Court with an appellate jurisdiction confined to federal law matters only, but one which would, of course, include constitutional disputes. In our view this approach has the merit of serving the interests of both those who wish to have provincial law interpreted by tribunals which are more sensitive to the distinctive characteristics and problems of the local society and those who desire the

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[1] See above, chapter II, section 1, for our discussion of federalist concerns.

Supreme Court of Canada to emerge as a more statesmanlike arbiter of legal disputes which are of nation-wide importance. It would certainly have the effect of leaving control over the interpretation of Quebec's distinctive system of private law entirely in the hands of Quebec jurists. It would accomplish this without adding another level of appeal from five senior jurists of Quebec's appellate court to a similar number of Quebec jurists in a specialized civil law chamber of the Supreme Court.[1] Also the benefits which may result from having judges familiar with local conditions interpret provincial statutes, would in the two chamber scheme be confined to Quebec, whereas if the federalist approach were adopted they would be extended to all the provinces.

No doubt the removal of the Supreme Court's jurisdiction in provincial law matters would eliminate the use of the federal judiciary as an instrument for bringing about a greater uniformity of laws in Canada. But the proper instrument for achieving such uniformity in those areas of law subject to provincial jurisdiction is through the device of federal-provincial legislative co-operation as

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[1] This, for instance, would be the situation under the two chamber proposal recently suggested by Dean Azard, above page 496, footnote 1.

clearly envisaged in Section 94 of the B.N.A. Act. And it should be noted that it was never contemplated by the framers of that Section that Quebec would be interested in subjecting its laws relating to Property and Civil Rights to such an homogenizing process.

Also if one wanted the natinnal appellate court to have the final determination of issues such as those raised in the Chaput, Lamb and Roncarelli cases in which fundamental principles of public law were threatened by provincial legislative or executive action, it would be necessary to arm the Supreme Court with an extensive certiorari jurisdiction. Possibly the most effective instrument for creating such a jurisdiction would be a Constitutional Bill of Rights binding on the provinces and the federal government, and for which the Supreme Court would be the final interpreter.

Ther termination of appeals in provincial law matters

would also have the effect of leaving the Supreme Court free to concentrate its energies on the larger issues of public law which are of concern to the whole nation. There would probably be as a result of this change in the Court's jurisdiction an increase in the number of jurisdictional disputes it would have to handle. But this would surely be outweighed by the elimination of the great number of cases concerning petty disputes between private groups and individuals which now account for the largest part of the Court's work-load. Indeed this reduction of the Court's work-load would make it possible for its members to conduct a more sensitive screening of the cases which it decides to hear on the merits. In addition, it would facilitate the hearing of important cases by all of the Court's members and provide them with more time and possibly more inspiration to carry out extensive research and concerted reflection and discussion on the issues raised by these cases.

In a way, the Supreme Court which we contemplate as a result of this reform resembles the Constitutional Court which some writers[1] and a number of briefs to this Royal Commission have recommended. However, it differs from these proposals in two important respects. In the first place, unlike a Constitutional Court which would be only occasionally consulted to settle disputes over the meaning of the Constitution, the Supreme Court we envisage would be in session at least as

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[1] A prominent spokesman for this idea is Professor Jacques-Yves Morin of the University of Montreal's Faculty of Law. See his "A Constitutional Court for Canada", 43 Canadian Bar Review (1965) 545.

frequently as it is now, handling the full range of issues related to the federal law and constitution. The calibre of the Court's decisions and the respect which they would inspire, would, we think, be thoroughly undermined if the Court was no more than an occasional gathering of jurists to deal with urgent constitutional questions.

Secondly, as to the mode of selecting judges, we are opposed to the suggestion which is sometimes contained in proposals for a Constitutional Court that Quebec and the Federal Government each appoint half the members of such a tribunal. In our investigation of the present system of appointments we pointed out the tendency of the federal government's tight monopoly of power over all senior judicial appointments in Canada to confine its selection to a rather small circle of provincial judges and politicians. In order to break that monopoly and also in order to increase the Provinces' trust and confidence in the Court, we definitely favour provincial participation in the appointment of Supreme Court judges. However, it would be a grave mistake to divide the power of appointment between Quebec and Ottawa. Whatever the future of the Supreme Court's jurisdiction, it is bound to embrace a great host of issues which are not immediately concerned with Quebec's relationship to Ottawa or the other provinces.

It is the linguistic dimension of French culture which we feel should be given equal status in the Supreme

Court, for it is this aspect of French culture which is obviously shared by all French-speaking Canadians regardless of the province in which they reside. Bilingualism can be provided for by the appointment of genuinely bilingual judges or, in lieu of that, the use of various translation devices which we have proposed in Chapter III. The civil law element in French-Canadian culture is operative only in the Province of Quebec and is best sustained by leaving its development in the hands of Quebec jurists. Finally as for the dualism of French-English values in the Supreme Court's work as Canada's highest tribunal, it is our conclusion that few of the major issues in the field of public law which the Supreme Court is likely to face turn on a dichotomy of values which results from ethnic determinism. The comparative law advantages which may result from the interaction of common law and civil law approaches can continue to enrich the Supreme Court's jurisprudence without establishing numerical parity between the representatives of the two legal traditions. French-Catholic values and English-Protestant values are only two of the large number of cultural forces which may affect the opinions of Supreme Court judges. In the future, if the Court can become more

corporate in its decision-making techniques it should play an even greater role than it has in the past as an integrative force, weaving together in its own consensus the outlooks and philosophies of its various members. But the primary function of the Supreme Court has not been and should not become the arbitration of differences between French and English Canada. Its prime function should be the development of a national jurisprudence which can be equally shared by French and English-speaking citizens but which is appropriately sensitive to all of the country's major problems including its bicultural ones.

APPENDIX I

OUTLINE OF RESEARCH PROJECT ON SUPREME COURT for Royal Commission on Bilingualism and Biculturalism

I. General Aims

1) To describe and analyse the extent to which the Supreme Court functions as a bilingual institution.

2) To examine the main effects which the Supreme Court's decisions (particularly in the post-1949 period) have had on the general problems of biculturalism and Confederation.

3) To see both in general as well as in specific areas of the law whether any clear relationship can be shown to exist between the ethnic or provincial backgrounds of Supreme Court Justices and their judicial behaviour.

II. Specific Parts of Research

A. Bilingualism in the Supreme Court's Proceedings

Purpose: To examine the bilingual facilities of the Court

Method:

(1) Personnel of the Court

(i) document representative character of appointments to the Court

(ii) analysis of background of judges: place of birth and upbringing, education, previous legal and judicial experience.

(2) Presentation of cases

(i) examine relative importance of written and oral presentations.

(ii) see in what languages oral pleadings and written briefs given.

(iii) investigate briefly the facility of English-speaking judges in French, and French-speaking judges in English.

(iv) question a few of the English and French counsel who appear frequently before the court as to their impressions of linguistic problems.

(3) Court's records

(i) see what language judgments written in and translation services.

(ii) check language of all other court records, rules, etc.

(4) Comparative

(i) brief investigation of bilingualism in proceedings of foreign courts based on available secondary sources.

Estimate of Work Involved and Assistance Required:

It should be possible to do this part of the project in a short time without any specialized assistance. Three to four weeks should be sufficient. Perhaps one of the comparative studies could provide most of the material for 4(i).

B. Quantitative Study of Supreme Court's Decision Since 1949

Purpose:

(1) To examine the aggregate nature of the Court's work as it affects bicultural and federal issues.

(2) To detect voting patterns on the Court in general and determine whether there are ethnic or provincial groupings of judges in specific classes of cases.

Method:

(1) Apply each of the questions on the attached questionnaire to each of the Supreme Court's decisions since 1949.

(2) Tabulate the results of (1).

(3) Correlate the answers to questions (4) to (10) with classes of cases identified by questions (1) to (3). Analyze results to see if in Court's decisions in situations which are particularly sensitive to bicultural or federal issues there is a marked tendency to affirm or reverse decisions of a

particular provincial appeal court. (See Appendix for outline of relationships which should be investigated).

(4) Test other possible correlations, e.g. Question (6) and (10). (See Appendix for outline of relationships which should be identified).

(5) Try to detect overall voting patterns on basis of answers to Question (11).

Possibly use here bloc-analysis techniques developed by C.H. Pritchett and Glendon Schubert in U.S. The main purport of this technique is to compare cohesion in a postulated bloc of judges to general cohesion on the court.

(6) Run specific tests to see if there is any indication of consistent bloc-voting based on ethnic or provincial identification in specific classes of cases or combinations of classes.

Estimate of Work Involved and Assistance Required:

1) A minimum of two qualified research assistants to carry out step 1). They should be preferably students who have completed the three years (Toronto) of basic legal training.

2) Consultation of Law Professor to guide selection and work of research assistants - especially on application of questions like No. 8 on Questionnaire. Professor Harry Arthurs of Osgoode Hall Law School is willing to serve in this capacity. He guided the very brief statistical study of Supreme Court decisions recently published in the Osgoode Hall Law Journal.

3) Data-processing consultation and work.

K.C.S. Limited, a firm of business consultants who do much of the programme preparation for University of Toronto Computor-Science Centre, could do key-punching and card sorting required for steps 2) to 6) for a maximum cost of $1,000. Once the questionnaire is completed and the cards punched, it is expected that the Royal Commission's statistical staff will be able to do the computations and tabulations required.

4) Possible consultation with someone with experience in Pritchett-Schubert bloc-analysis techniques to advise on steps 4) and 5).

C. Qualitative Appraisal of Supreme Court's Decisions as They Affect Bicultural Issues and Problems

Purpose:

Examine important cases in which the Court has dealt with issues that are particularly sensitive to

bicultural issues with a view to seeing what the Court's major contributions have been, and how particular judges have approached these issues.

Method:

(1) Selection of cases

(i) intuitive - there are a number of cases which are well known for the major questions they raised, e.g. the Roncarelli case. - It might be advisable here (if this is not already being done) to go back beyond 1949 and, in particular, record and examine Court's treatment of cases involving Section 93 of B.N.A. Act and other educational rights of religious minorities, and possibly those decisions, if any, that deal with Section 133 of B.N.A. Act.

(ii) Systematic-issue a general directive to research assistants doing step 1) in Part D to sift out any case which (a) raises a particularly vital issue which involves significant interaction or clash of cultures; (b) use of English and/or French language texts (e.g. of statutes) to explain each other; (c) comments of judges on bicultural questions.

(2) Write interpretative essay on Court's performances in these key cases.

(3) Relate conclusions reached in (2) with conclusions from Section B (especially question no. 8). See whether tendencies, if any, detected in B born out by detailed study of leading cases.

Estimate of Work Involved and Assistance Required:

This will require the services of a person who is professionally trained in Canadian jurisprudence. It is essential that this part of the project be closely associated with the quantitative study proposed in Part B. The latter could not be relied upon to establish any positive theses re the ethnic background of judges and their decisions unless such generalizations arising out of statistical correlations were supported by a thoughtful and informed analysis of the leading cases.

APPENDIX II

Covering Letter and Questionnaire on the Use of Language in the Supreme Court by French-speaking Lawyers.

Cher Monsieur

La Commission royale d'enquête sur le bilinguisme et le biculturalisme sollicite votre appui afin de mener à bien une étude sur la Cour suprême du Canada. Notre équipe de recherches a déjà commence ses travaux, mais l'étude d'un point bien particulier ne peut se faire qu'avec votre collaboration; il s'agit de l'emploi de la langue à la Cour supreme.

Dans le but de faire rapport sur l'etat et la pratique du bilinguisme dans les services et institutions de l'administration federale, selon les termes du mandat de la Commission, il nous parait essentiel d'obtenir l'opinion des membres du barreau qui ont acquis une expérience de première main en exerçant leur profession à la Cour suprême. C'est la raison pour laquelle nous envoyons le questionnaire ci-joint aux juristes de langue française qui, au cours des deux dernières années, ont comme vous plaidé une cause en provenance du Québec devant la Cour suprême du Canada. (Si nous faisons erreur et que votre langue maternelle

ne soit pas le français, veuillez simplement nous renvoyer le questionnaire). Le professeur Peter H. Russell de notre personnel de recherches est responsable de cette étude. Nous vous serions reconnaissante de bien vouloir remplir le questionnaire ci-joint et de lui retourner dans les dix jours, dans l'enveloppe adressée à cette fin.

Les avocats de langue française qui ont plaidé en appel dans une cause québécquoise sont si peu mombreux qu'il est extrêmement important que chaque intéressé veuille bien nous apporter son concours. Votre collaboration nous rendra le plus grand service.

Soyez certain que vos reponses demeureront confidentielles et que les publications fondées sur cette étude ne mentionneront que les résultats d'ensemble et non l'opinion de particuliers.

Veuillez agréer l'expression de nos sentiments distingués.

Questionnaire sur l'emploi de la langue à la Cour suprême

Expérience professionnelle et notes biographiques

1. Où exercez-vous votre profession?
(pointer la bonne réponse)

[3] Etude privée

[11] Bureau comptant moins de 5 avocats

[11] Bureau comptant de 5 à 15 avocats

[3] Bureau comptant plus de 15 avocats

[3] Pour le compte du gouvernement de la province de Québec

[3] Pour le compte du gouvernement fédéral

[0] Sinon, veuillez préciser

2. a) Vous spécialisez-vous (plus de la moitié de votre travail) dans une branche particulière du droit?

[23] Oui

[17] Non

b) Si vous avez répondu "oui" a la question 2a, prière d'indiquer votre spécialisation.

3. Combien de causes avez-vous portées devant la Cour suprême?

4. a) En quelle année avez-vous plaidé votre première cause à la Cour supreme?

b) En quelle année avez-vous plaidé votre dernière cause à la Cour suprême?

5. a) A quel point êtes-vous versé en langue anglaise?

[24] Parfaitement bilingue (vous n'hésitez pas à plaider une cause en anglais)

[15] Moyennement bilingue (vous hésiteriez à plaider une cause en anglais mais si les circonstances l'exigeaient, vous en seriez capable)

[1] A peine bilingue (vous êtes capable de lire l'anglais, mais vous ne plaideriez pas une cause en cette langue)

[0] Pas du tout bilingue (vous ne lisez, ni ne parlez, l'anglais).

b) Les autres avocats de votre bureau ou de votre ministere sont-ils bilingues?

[11] Tous sont vraiment bilingues

[8] Plus de la moitié sont vraiment bilingues

[6] A peu pres la moitié sont vraiment bilingues

[11] Moins de la moitié sont bilingues

[1] Aucun n'est vraiment bilingue

[3] Ne s'applique pas

6. Ou avez-vous fait vos études?

a) Etudes non-juridiques

Université _____ Diplome _____

Université _____ Diplome _____

Université _____ Diplome _____

b) Etudes juridiques

Université _____ Diplome _____

Université _____ Diplome _____

Université _____ Diplome _____

Emploi de la langue à la Cour supreme

7. Les facteurs énumérés ci-dessous ont-ils joué dans le choix de la langue employée pour la rédaction d'un factum d'un appel que vous deviez porter devant la Cour suprême? (Répondre "oui" ou "non" pour chaque factuer)

	Qui	Non
1) Vos propres capacités linguistiques	17	23
2) Langue dans laquelle la cause a été plaidée devant les tribunaux inférieurs	10	30
3) Langue dans laquelle le jugement a été rendu par les tribunaux inférieurs	7	33
4) Langue de votre client	10	30
5) Langue utilisée par la partie adverse (avocat ou plaideur)	7	33
6) Le point en litige (question de fait ou de droit)	6	34
7) Votre appréciation des capacités linguistiques des juges devant lesquels vous devez plaider	29	11
8) Les connaissances linguistiques de votre personnel de bureau	3	37
9) La langue que vous comptez employer lors de votre plaidoyer	21	19
10) Autres facteurs (préciser)	3	37

8. a) Parmi les facteurs énumérés ci-dessus y en a-t-il un qui a exercé plus d'influence que les autres dans le choix de la langue employée dans la rédaction de factums pour la Cour supreme?

[38] Oui

[2] Non

b) Si vous avez répondu "oui" à la question a), veuillez identifier le facteur par son numéro.

c) Si vous avez répondu "non" à la question a), veuillez identifier par leurs numéros les facteurs qui ont le plus souvent déterminé le choix de la langue utilisée dans la rédaction de factums pour la Cour supreme.

9. Quelle langue utilisez-vous dans la rédaction de factums destinés à la Cour supreme?

[13] Toujours français

[7] D'ordinaire le français, mais parfois l'anglais

[3] Aussi souvent le français que l'anglais

[9] D'ordinaire l'anglais, mais parfois le français

[8] Toujours l'anglais

10. Les facteurs énumérés ci-dessous ont-ils joué dans le choix de langue que vous avez employée pour la présentation orale de vos arguments à la Cour suprême? (Répondre "oui" ou "non" pour chaque facteur)

	Oui	Non
1) Vos propres capacités linguistiques	18	22
2) Langue dans laquelle la cause a été plaidée devant les tribunaux inférieurs	11	29
3) Langue dans laquelle le jugement a été rendu par les tribunaux inférieurs	5	35
4) Langue de votre client	9	31
5) Langue utilisée par la partie adverse (avocat ou plaideur)	5	35
6) Le point en litige (question de fait ou de droit)	23	17
7) Votre appréciation des capacités linguistiques des juges devant les quels vous devez plaider	14	24
8) Langue utilisée par les juges pour vous interroger	17	23
9) Langue dans laquelle votre factum est rédigé	3	37

10) Langue utilisée par un autre avocat parmi vos collaborateurs plaidant la même cause [2] [38]

11) Autres facteurs (préciser) [3] [37]

11. a) Parmi les facteurs énumérés ci-dessus y en a-t-il un qui a exercé plus d'influence que les autres dans le choix de la langue employée pour la présentation orale de vos arguments à la Cour supreme?

[40] Oui

[0] Non

b) Si vous avez répondu "oui" à la question a), veuillez identifier le facteur le plus important par son numéro.

c) Si vous avez répondu "non" à la question a), veuillez identifier par leurs numéros les facteurs qui ont le plus souvent déterminé le choix de la langue utilisée pour la présentation orale de vos arguments à la Cour suprême.

12. Quelle langue utilisez-vous pour la présentation orale de vos arguments à la Cour suprême?

[9] Toujours le français

[9] D'ordinaire le français, mais parfois l'anglais

[8] Aussi souvent le français que l'anglais

[10] D'ordinaire l'anglais, mais parfois le français

[4] Toujours l'anglais

13. Vous est-il déjà arrivé de rédiger le factum d'un appel à la Cour suprême dans une langue et ensuite d'utiliser l'autre langue pour la présentation orale de vos arguments?

[24] Oui

[16] Non

Comparaison avec d'autres tribunaux et d'autres temps

14. Quelle langue utilisez-vous habituellement devant les tribunaux du Québec?

[11] Toujours le français

[25] D'ordinaire le français, mais parfois l'anglais

[3] Aussi souvent le français que l'anglais

[ ] D'ordinaire l'anglais, mais parfois le français

[ ] Toujours l'anglais

15. Les causes que vous avez plaidées en anglais devant la Cour suprême (rédaction du factum ou présentation orale des arguments), les aviez-vous plaidées en français devant les tribunaux du Québec?

[13] Oui, toutes

[16] Oui, la plupart

[2] Oui, certaines

[ ] Non, jamais

[6] Ne s'applique pas - je n'ai jamais employé l'anglais à la Cour suprême

16. a) Avez-vous déjà plaidé une cause devant le Comité judiciaire du Conseil privé?

[2] Oui

[38] Non

b) Dans l'affirmative, avez-vous utilisé pour la rédaction du mémoire ou pour la présentation orale des arguments une langue autre que celle que vous aviez employée a la Cour suprême du Canada?

[1] Non

[1] Oui (veuillez préciser la différence)

17. a) Au cours des dernières années, vous êtes-vous servi de plus en plus du français pour le plaidoyer de vos causes devant la Cour suprême du Canada?

[14] Oui

[26] Non

b) Ou au contraire, vous êtes-vous servi de plus en plus de l'anglais pour le plaidoyer de vos causes devant la Cour suprême?

[1] Oui

[39] Non

c) Si vous avez répondu "oui" a l'une des deux questions précédentes ("a" ou "b"), à quoi attribuez-vous cette tendance?

[2] La situation n'est plus la même à la Cour

[1] Evolution de vos capacités linguistiques

[6] Autres raisons (prière de préciser)

Difficultés personnelles

18. Croyez-vous que les avocats du Québec dont la langue maternelle est le français soient désavantagés lorsqu'ils se présentent devant la Cour suprême?

[7] Oui, ils le sont tous

[13] Oui, la plupart

[12] Oui, certaine d'entre eux

[8] Non, aucun n'est désavantagé

19. Croyez-vous que la question de la langue réduit le nombre des avocats du Québec qui peuvent exercer leur profession devant la Cour suprême?

[12] Oui, de beaucoup

[17] Oui, un peu

[10] Non, pas du tout

20. Dans votre cas personnel, croyez-vous que le fait que votre langue maternelle est le français soit un désavantage dans l'exercice de votre profession devant la Cour suprême?

[10] Oui, c'est un sérieux désavantage

[11] Oui, c'est un léger désavantage

[19] Non, je n'y trouve aucun inconvénient

21. a) Croyez-vous que ceux pour qui la langue présente un désavantage dans l'exercice de leur profession devant la Cour suprême ressentent cet inconvénient plus particulièrement dans certaines causes que dans d'autres?

[16] Oui

[ ] Non

[ ] Ne s'applique pas

b) Si vous avez répondu "oui" a la question a), veuillez indiquer dans quels secteurs du droit ces difficultés sont les plus marquées.

22. Estimez-vous que les avocats qui sont désavantagés à la Cour supreme du fait de la langue ressentent cet inconvénient plus particulièrement lorsque certains juges ont été désignés pour entendre leur cause?

[24] Oui

[ ] Non

[ ] Ne s'applique pas

23. Vous est-il arrivé, par suite du probleme de la langue, d'abandonner a un autre une cause que vous auriez, dans d'autres circonstances, plaidée devant la Cour supreme?

[ ] Oui

[40] Non

24. Votre bureau a-t-il dû, par suite du problème de langue, abandonner à d'autres une cause qu'il aurait, dans des circonstances différentes, plaidée en appel devant la Cour suprême?

[ ] Oui

[40] Non

[ ] Ne s'applique pas

25. Le problème de la langue vous a-t-il fait hésiter a conseiller à un client d'en appeler de sa cause devant la Cour suprême?

[ ] Oui

[40] Non

26. A cause du probleme de la langue, vous êtes-vous jamais associé a un avocat de langue anglaise pour en appeler d'une cause devant la Cour suprême?

[1] Oui

[39] Non

Services fournis par la cour

27. Lorsque vous avez plaidé devant la Cour supreme, avez-vous éprouvé quelque difficulté de langage dans vos rapports avec le personnel administratif de la Cour?

[2] Oui

[38] Non

28. A votre avis, le manque de traductions officielles des décisions de la Cour suprême vous a-t-il causé un inconvénient?

[2] Oui - un gros inconvénient

[11] Oui - un léger inconvénient

[26] Non - aucun inconvénient

29. Estimez-vous que les Rapports de la Cour suprême devraient comporter une traduction officielle des décisions qu'ils contiennent?

[16] Toutes devraient être traduites

[13] Aucune ne doit être traduite

[10] Certaines devraient être traduites (prière de préciser)

30. a) Depuis peu, les rapports de la Cour suprême présentent certains résumés de jugements dans les deux langues. Trouvez-vous que cette innovation soit avantageuse?

[34] Oui

[5] Non

b) Estimez-vous que les résumés ainsi traduits soient suffisamment nombreux?

[9] Oui

[24] Non

c) Si vous avez répondu "non" a la question b), à quelles autres causes cette pratique devrait-elle s'appliquer?

[17] Toutes

[5] Certaines (prière de préciser)

Recommendations

31. a) Croyez-vous que les problèmes de langue à la Cour suprême soient suffisamment sérieux pour vous inciter à proposer soit la réforme de la Cour suprême, soit encore la réforme du systeme judiciaire du Canada?

[22] Oui

[18] Non

b) Si vous avez répondu "oui" à la question a), veuillez indiquer le genre de réforme que vous préconisez.

APPENDIX III

Questionnaire Applied to Supreme Court Cases Since 1949

SUPREME COURT CASES

QUESTIONNAIRE

Style of Cause_____

Citation_____, If unreported, Date_____

Q.1 ORIGIN AND DISPOSITION OF CASE ON THE MERITS		Check One	
(i) Supreme Court's Original Jurisdiction		5	1
(ii) Supreme Court Reference Case		7	2
(iii) Appeal from Federal Courts	Decision Affirmed	96	3
	Decision Reversed	77	4
(iva) Appeal from Provincial Court on leave granted by Supreme Court	Decision Affirmed	88	5
	Decision Reversed	85	6
(ivb) Appeal from Provincial Court on leave granted by Provincial Court	Decision Affirmed	55	7
	Decision Reversed	46	8

(ivc) Appeal as of right from

Provincial Court	Decision Affirmed	330	9
	Decision Reversed	206	0

(ivd) Appeal in forma pauperis [6] X

Q.2 MOTIONS FOR LEAVE TO APPEAL BEFORE SUPREME COURT

(i) From Federal Court	Motion Granted	2	1	Denied	5 2
(ii) From Provincial Court	Motion Granted	5	3	Denied	16 4
(iii) Leave for Rehearing	Motion Granted	1	5	Denied	2 6

Q. 3 APPEALS - PRIVATE OR PUBLIC LAW

Appeal from	Check one	
Newfoundland	3	1
Prince Edward Is.	4	2
Nova Scotia	15	3
New Brunswick	28	4
Quebec	248	5
Ontario	248	6
Manitoba	38	7
Saskatchewan	50	8
Alberta	72	9
Br. Columbia	126	0
Federal Court	178	X

	Check one
Private Law	668 1
Public Law - Constitutional	30 2
- Non-Const.	163 3
- Criminal	149 4

Disposition	Check one
Decision Affirmed	571 1
- Affirmed in part	37 2
- Reversed	393 3

Q. 4 DOMINION-PROVINCIAL RELATIONS (Inter-governmental litigations and interventions)

Appeal from (check one)

Newfoundland	[0] 1	Quebec	[0] 5	Alberta	[1] 9
Prince Edward Island	[1] 2	Ontario	[1] 6	British Columbia	[1] 0
Nova Scotia	[1] 3	Manitoba	[4] 7	Federal Court	[3] X
New Brunswick	[1] 4	Saskat-chewan	[2] 8		

Disposition Dominion wins [5] 1 Province wins [6] -

Other [4] 3

Q. 5 CONSTITUTIONAL CHALLENGES TO LEGISLATION

Source of Legislation

Newfoundland	[0] 1	Quebec	[5] 5	Alberta	[3] 9
Prince Edward Island	[1]	Ontario	[6] 6	British Columbia	[6] 0
Nova Scotia	[1] 3	Manitoba	[3] 7	Dominion	[11] X
New Brunswick	[3] 4	Saskat-chewan	[6] 8		

Disposition Legislation Upheld [28] 1 Denied in part [4] 2

Denied [12] 3

Q. 6. GOVERNMENT AS A PARTY (in public or private cases; excludes crown in criminal cases but includes other gov't agencies)

	APPELLANT			RESPONDENT		
	LITIGANT		INTERVENOR	LITIGANT		INTERVENOR
Newfoundland	0	1	1	1	1	0
Prince Edward Is.	1	2	0	0	2	0
Nova Scotia	1	3	0	1	3	0
New Brunswick	1	4	0	2	4	1
Quebec	1	5	1	9	5	5
Ontario	4	6	3	5	6	1
Manitoba	2	7	0	1	7	3
Saskatchewan	3	8	1	8	8	0
Alberta	3	9	0	1	9	1
British Columbia	9	0	1	8	0	2
Dominion	56	X	10	122	X	11
Other	27	X	0	33	V	1

Disposition Appellant wins 110 1 Respondent Wins 178 2

Split Decision 15 3

Q. 7. GROUP LITIGATION (including interventions)

(a) Religious Identity: Relevant - clear verdict [3] 1

- no clear verdict [4] 2

Irrelevant . . . . . [3] 3

Identity	Wins or Draws (check one)	Losses or Draws (check one)
Roman Catholic	[2] 1	[1] 1
Protestant	[2] 2	[0] 2
Jewish	[0] 3	[1] 3
Jehovah Witness	[1] 4	[1] 4
Other	[0] 5	[1] 5
No Religious Identity	[0] 6	[1] 6

(b) Ethnic Identity: Relevant - clear verdic [1] 1

- no clear " [1] 2

Irrelevant . . . . . [3] 3

Identity	Wins or Draws (check one)	Losses or Draws (check one)
French	[2] 1	[0] 1
English	[0] 2	[0] 2
Other	[1] 3	[0] 3
No Ethnic Identity	[0] 4	[2] 4

Q. 8. INTERACTION OF PRIVATE-LAW SYSTEMS

Jurisdiction	Decisive Precedent Applied (check one)					
Civil Code	Civil Code	162	1	Common Law	3	2	Both	15	3
Common Law	Civil Code	1	4	Common Law	442	5	Both	0	6

Q. 9. INTERACTION OF PROVINCIAL LEGAL SYSTEMS

Did case involve choice between competing lines of provincial cases? Yes 9 1 No 1021 2

Province whose System Applied (check one)

Newfoundland	1	1	Quebec	5	5	Alberta	0	9
Prince Edward Island	1	2	Ontario	0	6	British Columbia	1	0
Nova Scotia	0	3	Manitoba	0	7	Coexistence	0	X
New Brunswick	0	4	Saskatchewan	1	8	Not Applicable	0	Y

Q.10. USE OF FOREIGN LEGAL SYSTEMS

Did case involve reference to legal system of -	Yes		No.	
Any foreign country	481	1	549	2
Great Britain?	445	1	585	2
France?	29	1	1001	2
Australia?	8	1	1022	2
Other?	10	1	1020	2

Q. 11. BICULTURAL ISSUES

Appeal from (check one)

Newfoundland	0	1	Quebec	21	5	Alberta	2	9
Prince Edward Island	0	2	Ontario	36	6	British Columbia	21	0
Nova Scotia	2	3	Manitoba	4	7	Federal Court	6	X
New Brunswick	4	4	Saskat-chewan	2	8	Reference Case	0	Y

ISSUE INVOLVED -	YES		NO		ISSUE INVOLVED -	YES		NO	
Family Relationship	17	1	1014	2	Civil Liberties	75	1	956	2
Obscenity	1	1	1030	2	Education	5	1	1026	2
Morals	5	1	1026	2	Other	4	1	1027	2
Religious Beliefs	13	1	1018	2	No Issue	0	1	1031	2

Q.12 ATTENDANCE AND VOTING OF JUDGES

Judge			No. of Judges Present			In Dissent	
Rinfret	125	1	25	2	102	3	768	4
Taschereau	574	1	48	2	405	3	0	4
Fauteux	560	1	36	2	432	3	0	4
Kerwin	485	1	51	2	394	3	95	4
Cartwright	589	1	118	2	318	3	0	4
Kellock	228	1	17	2	279	3	499	4
Locke	487	1	80	2	321	3	132	4
Estey	232	1	20	2	117	3	650	4
Rand	359	1	47	2	218	3	399	4
Abbott	434	1	26	2	314	3	250	4
Spence	29	1	2	2	23	3	965	4

Q. 12 (cont.) ATTENDANCE AND VOTING OF JUDGES

Judge	No. of Judges Present				In Dissent			
Judson	315	1	22	2	162	3	320	4
Hall	53	1	5	2	56	3	906	4
Nolan	49	1	2	2	65	3	903	4
Martland	319	1	16	2	169	3	519	4
Ritchie	243	1	12	2	142	3	623	4

Q. 13. Does this case raise a particularly vital issue which involves a significant interaction or clash of cultures? YES 29 1 NO 1001 2

Q. 14. Did any of the judges use English to explain a French Text? YES 12 1 NO 1018 2

Q. 15. Did any of the judges use French to explain an English text? YES 7 1 NO 1023 2

Q. 16. Did any English-speaking judge express himself in French? YES 7 1 NO 1023 2

Q. 17. Did a French-speaking judge express himself in English? YES 130 1 NO 900 2

Q. 18. Did any of the judges comment directly on bicultural or bilingual problems? YES 2 1 NO 1028 2

APPENDIX IV

Bicultural Issue Cases

CASES IDENTIFIED BY QUESTION 11 of QUESTIONNAIRE

I Bicultural Issues (Q.11)

(a) Family Relationship

(1) McKee v. McKee (1950) SCR 700

(2) LeBaby v. Duffell (1950) SCR 737

(3) Smith v. Smith (1952) 2 SCR 312

(4) Taillon v. Donaldson (1953) 2 SCR 257

(5) The Queen et al v. Leong Ba Chai (1954) SCR 669

(6) Carnochan v. Carnochan (1955) SCR 669

(7) Bickley v. Bickley & Blanchley (1957) SCR 329

(8) Hepton et al v. Maat et al (1957) SCR 606

(9) Hellens v. Densmore (1957) SCR 768

(10) Re Agar: McNeilly et al v. Agar (1958) SCR 52

(11) Little et al v. Little (1958) SCR 566

(12) Thompson v. Thompson (1961) SCR 3

(13) Kruger v. Booker (1961) SCR 231

(14) Rochan v. Castonguay (1961) SCR 359

(15) Sura v. M N R (1962) SCR 65

(16) In Re Clement: Gardner et al v. Gardner et al (1962) SCR 235

(17) In Re Gage: Ketterer et al v. Griffith et al (1962) SCR 241

(b) Obscenity

(1) Brodie, Dansky, Rubin v. The Queen (1962) SCR 681

(c) Morale

(1) Lord's Day Alliance of Canada v. A.G.B.C. (1959) SCR 497

(2) Gordon v. The Queen (1961) SCR 592

(3) Brodie, Dansky, Rubin v. The Queen (1952) SCR 681

(4) A.G. Ont. v. Barfield Enterprises Ltd. (1963) SCR 570

(5) Dominion News & Gifts (1962) Ltd. v. The Queen (1964) SCR 251

(d) Religious Beliefs

(1) Major v. Town of Beauport & A.G. Quebec (1951) SCR 60

(2) Boucher v. The King (1951) SCR 265

(3) Schara Tzedeck v. The Royal Trust Co. (1953) 1 SCR 31

(4) Saumur v. City of Quebec (1953) 2 SCR 299

(5) Henry Birks & Sons (Montreal) Ltd. v. City of Montreal & A.G. Que. (1955) SCR 799

(6) Chaput v. Romain et al (1955) SCR 834

(7) Roncarelli v. Duplessis (1959) SCR 121

(8) Lamb v. Benoit et al (1959) SCR 321

(9) Lord's Day Alliance of Canada v. A.G. B.C. et al (1959) SCR 497

(10) Lieberman v. The Queen (1963) SCR 644

(11) Robertson & Rosetanni v. The Queen (1963) SCR 651

(12) Saumur et al v. Procureur Général de Quebec et al (1964) SCR 252

(13) Winnipeg Film Society v. Webster (1964) SCR 280

(e) Civil Liberties

(1) Frank Miller v. The King (1950) SCR 168

(2) McKee v. McKee (1950) SCR 700

(3) Major v. Town of Beauport & A.G. Quebec (1951) SCR 60

(4) Noble & Wolf & Alley (1951) SCR 64

(5) Boucher v. The King (1951) SCR 265

(6) Wright v. Wright (1951) SCR 728

(7) Robert Williams et al v. Aristocratic Restaurants Ltd. (1951) SCR 762

(8) Rex v. Murakim: (1951) SCR 801

(9) Winner v. S.M.T. (Eastern) Ltd. (1951 SCR 887

(10) Picard v. Warren (1952) 2 SCR 433

(11) Bursch v. The Queen (1953) SCR 373

(12) Kieffer v. The Secretary of State of Canada (1953) 2 SCR 198

(13) Rothie v. Montreal Trust Co. (1953) 2 SCR 204

(14) Piperino v. The Queen (1953) 2 SCR 292

(15) Page and Others v. A.G. B.C. (1953) 1 SCR 516

(16) Saumur v. City of Quebec (1953) 2 SCR 299

(17) The Queen et al v. Leong Ba Chai (1954) SCR 10

(18) Masella v. Langlois (1955) SCR 263

(19) Mehr v. The Law Society of Upper Canada (1955) SCR 344

(20) Narine Singh v. A.G. Canada (1955) SCR 395

(21) Henry Birks and Sons (Montreal) Ltd. v. City of Montreal & A.G. Que. (1955) SCR 799

(22) Chaput v. Romain et al (1955) SCR 834

(23) Carroll v. The Corporation of the City of Ottawa (1956) SCR 266

(24) A.G. Canada v. Brent (1956) SCR 318

(25) Ross v. Lamport (1956) SCR 366

(26) Frei v. The Queen (1956) SCR 462

(27) King v. Colonial Homes Ltd. et al (1956) SCR 528

(28) Francis v. The Queen (1956) SCR 618

(29) Parkes v. The Queen (1956) SCR 678

(30) Board of Health for Township of Saltfleet v. Knapman (1956) SCR 877

(31) Kirkland v. The Queen (1957) SCR 3

(32) Switzman v. Elbling & A.G. Que. (1957) SCR 285

(33) Orchard et al v. Tunney (1957) S.C.R. 436

(34) Beaver v. The Queen (1957) SCR 531

(35) Metro Toronto v. City of Forest Hill (1957) SCR 569

(36) The Queen v. Neil (1957) SCR 685

(37) Re. Duncan (1958) SCR 41

(38) Beatty et al v. Kozak (1958) SCR 177

(39) Dennis v. The Queen (1958) SCR 473

(40) Re. Goldhar (1958) SCR 692

(41) Roncarelli v. Duplessis (1959) SCR 121

(42) Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co. (1959) SCR 271

(43) Lamb v. Benoit et al (1957) SCR 321

(44) Tsp. of Scarborough v. Bandi (1959) SCR 444

(45) Can. Petrofina Ltd. v. Martin & City of St. Lambert (1959) SCR 453

(46) Lord's Day Alliance of Canada v. A.G. B.C. (1959) SCR 497

(47) Henderson v. Johnson et al (1959) SCR 655

(48) Goldhar v. The Queen (1960) SCR 431

(49) Louie Yust Sun v. The Queen (1960) SCR 70

(50) Marshall v. The Queen (1961) SCR 123

(51) Rebrin v. Bird & Min. of Citizenship & Immigration (1961)

(52) E. Gagnon et al v. Foundation Maritime Ltd. (1961) SCR 435

(53) Banks v. Globe & Mail Ltd. et al (1961) SCR 474

(54) Harnish v. The Queen (1961) SCR 511

(55) Gordon v. The Queen (1961) SCR 592

(56) Seafarers' International Union v. Stern (1961) SCR 682

(57) A.G. Canada v. Readers Digest Ass'n (1961) SCR 775

(58) In Re Shumiatcher (1962) SCR 38

(59) First Industrial Ret'rs Ltd. v. Int'l Union of Operating Engineers Local 882 (1962) SCR 80

(60) Nordstrom & Baumann (1962) SCR 147

(61) Cdn. Fishing Co. et al v. Smith et al (1962) SCR 294

(62) C.P.R. v. Zambri (1962) SCR 609

(63) Brodie, Dansky, Rubin v. The Queen (1962) SCR 681

(64) The Queen v. McGroth (1962) SCR 739

(65) Kinnaird v. Workman's Comp. Board (1963) SCR 239

(66) Union Local 16-601 v. Imperial Oil Ltd & A.G. B.C. (1963) SCR 584

(67) Lieberman v. The Queen (1963) SCR 644

(68) Robertson& Rosetanni v. The Queen (1963) SCR 651

(69) Espoullat Rodriguez v. The Queen (1964) SCR 3

(70) In Re Darby (1964) SCR 64

(71) Magda v. The Queen (1964) SCR 72

(72) Prince & Myron v. The Queen (1964) SCR 81

(73) Dominion News & Gifts (1962) Ltd. v. The Queen (1964) SCR 251

(74) Saumur et al v. Procureur Général de Quebec et al (1964) SCR 252

(75) Winnipeg Film Society v. Webster (1964) SCR 280

(f) Education

(1) Bouchard v. Les Commissionaires D'Ecoles (1950) SCR 479

(2) City of Outremont v. Protestant School Trustees (1952) 2 SCR 506

(3) City of Outremont v. Protestant School Trustees (1952) 2 SCR 515

(4) Vandeberckhove v. Township of Middleton (1962) SCR 75

(5) Brodie, Dansky, Rubin v. The Queen (1962) SCR 681

(g) Other

(1) A.G. of N.S. v. A.G. Canada & Lord Nelson Hotel Co. Ltd. (1951) SCR 31

(2) The King v. The Assessors of the Town of Sunny Brae et al (1952) SCR 76

(3) Samson v. The Queen & A.G. Nfld (1957) SCR 832

(4) A.G. Canada v. Readers Digest Association (1961) SCR 775